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Supreme Court, U.S.
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No. ____

IN THE
Supreme Court of the United States

ERIC WALLACE,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Due Process Clause requires that a defendant who has pled guilty nonetheless retains the right to contest on direct appeal a trial court's competency determination.

PARTIES TO THE PROCEEDING

There were no parties to the proceedings below other than those identified in the caption of this petition.

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PETITION FOR A WRIT OF CERTIORARI

Eric Wallace respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 2007 WL 2669564 (D.C. Sept. 13, 2007), and is reprinted in the Appendix to this petition ("Pet. App.") at 1a. The trial court's competency determination (Pet. App at 71a) is unpublished. The trial court's denial of petitioner's motion to withdraw his guilty plea (Pet. App. at 51a) is unpublished.

JURISDICTION

The court of appeals entered its judgment on September 13, 2007. This Court has jurisdiction under 28 U.S.C. § 1257(a)-(b).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law."

The Fourteenth Amendment, Section 1, to the United States Constitution provides in relevant part that no State shall "deprive any person of life, liberty, or property, without due process of law."

STATEMENT

The Due Process Clauses of the Fifth and Fourteenth Amendments unequivocally require that no individual who is legally incompetent shall be

forced to answer a criminal charge. In the proceedings below, the trial court determined that petitioner Eric Wallace was legally competent to stand trial for murder, despite abundant evidence to the contrary. Unable to help his defense, Mr. Wallace pled guilty, and then sought to argue on direct appeal that his conviction violated Due Process because he was not competent to stand trial or enter a guilty plea.

In the decision below, the District of Columbia Court of Appeals held that it could not review Mr. Wallace's constitutional claim on direct appeal, because "the only issues that are appropriately raised in an appeal from a conviction entered after a guilty plea are the exercise of jurisdiction by the trial court and the legality of the sentence imposed." Pet. App. 4a-5a (citation omitted). In other words, Mr. Wallace had waived the right to assert his constitutional competency claim when he pled guilty. The court thus dismissed Mr. Wallace's direct appeal.

The decision below implicates a deep and acknowledged split among the federal courts and state courts of last resort – a split that the D.C. Court of Appeals expressly noted in its opinion. *See* Pet. App. 5a-7a. Indeed, courts in Vermont, New York, Kentucky, Michigan, and several other States have held, contrary to the D.C. Court of Appeals, that a guilty plea does not waive a constitutional challenge to the competency of the defendant. They have thus allowed such challenges to be raised on direct appeal.

This split warrants this Court's immediate attention. The prohibition on trying a defendant who is incompetent goes to the core of the Due Process Clause. By denying defendants such as Mr. Wallace a right to challenge their competence on direct appeal, the decision below severely limits the ability of those defendants to obtain review of their constitutional claims, leaving them only the opportunity to demonstrate that their conviction constitutes a "manifest injustice." For someone like Mr. Wallace, whose compelling facts presented "a difficult case" even under the narrow scope of review employed below, Pet. App. 1a, that makes all the difference.

This Court should thus grant review to determine, consistent with the majority of courts to have considered the issue, that Due Process requires that a defendant who pleads guilty nevertheless must be permitted to challenge his competency determination on direct appeal.

1. Petitioner Eric Wallace was indicted in May 2003 on the charge of first degree murder in connection with the stabbing death of Claude McCants. The murder occurred on October 10, 2002, just hours after Mr. Wallace was released from St. Elizabeth's, a federal mental health hospital in Washington, D.C. Pet. App. 76a. Mr. Wallace had been in custody at St. Elizabeth's for eight months after having been determined incompetent to stand trial in connection with earlier misdemeanor charges. *Id.* at 74a-76a.

In pre-trial proceedings on the murder charge, Mr. Wallace asserted (through counsel) that he was

incompetent to stand trial, based on his substantial mental impairments resulting from a lifetime of diabetic comas and epileptic seizures. Pet. App. 80a, 110a. After conducting a hearing on the matter, the court found Mr. Wallace competent. *See id.* at 92a-93a. On January 5, 2004, Mr. Wallace pled guilty to second degree murder. *Id.* at 3a-4a. The trial court sentenced Mr. Wallace to a term of thirty-five years, with five years of supervised release. *Id.* at 1a, 52a.

2. Ample evidence supported Mr. Wallace's claim that he was not competent to stand trial. Since childhood, Mr. Wallace has been treated for a number of debilitating illnesses, which have only increased over the years, rendering him in his current severely incapacitated state. At age 9, Mr. Wallace was diagnosed with Type I Diabetes Mellitus, otherwise known as juvenile diabetes. Pet. App. 110a; *see also id.* at 12a. This disease has subjected Mr. Wallace to recurring episodes of hyperglycemia and hypoglycemia – erratic and abnormal swings in the content of sugar in his blood. *Id.* at 12a. On a number of occasions, Mr. Wallace's episodes have been so extreme that he has gone into a coma. Court of Appeals Appendix ("CA App.") 180 (Letter from Dr. Hyde). This type of recurring hypoglycemia, when accompanied with insulin shock, is known to cause irreversible brain damage. *Id.*

Independent of his diabetes, since age 12, Mr. Wallace has also experienced repeated epileptic seizures, which have been resistant to treatment. Pet. App. 12a, 81a. These seizures result in a loss of consciousness, falling, and contractions. *See The Merck Manual* 1403 (17th ed. 1999). In 1998, Mr.

Wallace's condition escalated when he experienced his first grand mal seizure. CA App. 183 (Letter from Dr. Pickar).

These relentless health problems have stunted Mr. Wallace's ability to function in society. They have also severely limited his ability to navigate the judicial system. In fact, just prior to the instant case, Mr. Wallace was repeatedly found incompetent to stand trial in relation to several misdemeanor assault charges stemming from incidents in early 2002. *See* Pet. App. 13a-14a n.14. Mr. Wallace spent eight months in St. Elizabeth's Hospital instead of facing trial. *Id.* Observing Mr. Wallace over that substantial eight-month period and based on their familiarity with him, government doctors at St. Elizabeth's found Mr. Wallace to be "severely impaired." *Id.* One physician, Dr. Hugonnet, determined that Mr. Wallace was "unable to manage the basic concepts associated with competency to stand trial." *Id.* Another, Dr. Piquet, found that "cognitive factors substantially impair his capacity to have a factual and rational understanding of the proceedings against him, and to properly assist counsel with preparation of his defense." *Id.* Moreover, they found that it was "unlikely that Mr. Wallace [would] attain competency in the foreseeable future." *Id.*

Because Mr. Wallace never attained competency, the judge in his misdemeanor case ruled that the law required that Mr. Wallace be released. *See* Henri E. Cauvin, *Guilty Plea in Slaying of Hill Aide*, Wash. Post, Jan. 6, 2004 at B1. The judge decided, however, to hold Mr. Wallace for 72 hours to give

prosecutors enough time to appeal the decision. *Id.* The U.S. Attorney's office decided not to appeal, and the District of Columbia never sought an order seeking to have Mr. Wallace held until it was determined whether he should be permanently committed. *Id.* Accordingly, on October 10, 2002, Mr. Wallace was released from St. Elizabeth's hospital. Hours later, Mr. Wallace killed Mr. McCants.

Returned to the confines of the criminal justice system, Mr. Wallace again underwent a number of tests that confirmed his continued incompetence to stand trial. A thorough neuropsychological evaluation conducted at St. Elizabeth's after Mr. Wallace was charged showed that Mr. Wallace performs "below the cutoff level" on measures of early dementia. Pet. App. 113a. Other tests confirmed Mr. Wallace's severely diminished level of functionality. On the Wechsler Adult Intelligence Scale, Mr. Wallace's aggregate IQ was just 55, placing him in the "severely impaired range" – below the first percentile of the entire population. *See id.* at 12a, 112a-113a. Electroencephalogram ("EEG") tests performed from 2000 to 2003 show increasing brain deterioration, with a December 2003 EEG indicating "markedly abnormal brain wave activity, with slowing over the frontal lobes." *Id.* at 29a.

Through numerous evaluations, government physicians determined that Mr. Wallace suffers from core cognitive deficits even on his best days; his dementia causes him to experience wild mood swings and aggressive behavior, and renders him incapable of understanding the core aspects of the judicial

process, including the concept of pleading guilty. *See* Pet. App. 107a-120a; *see also* CA App. 180-82 (Letter from Dr. Hyde); *id.* at 183-85 (Letter from Dr. Pickar).

3. At the competency hearing in the trial court, even the prosecution's own witnesses conceded that Mr. Wallace's mental capabilities were "in the moderate to severely impaired range." Pet. App. 16a. Nonetheless, the experts hired by the prosecution contended that Mr. Wallace was malingering.

That testimony was directly at odds with the conclusions of the doctors at St. Elizabeth's, who had subjected Mr. Wallace to a battery of tests over his months at the hospital and had found no signs of malingering. *See* Pet. App. 112a. Commenting on just one of these tests, one expert explained, "there's no way you can fake or malinger an abnormal EEG." CA App. 7 (Oct. 28, 2003 Transcript).

Moreover, the conclusions of the government's witnesses were deeply flawed. One of those witnesses, Dr. Raymond Patterson, based his opinion on a single interview, at which he did not perform a test for malingering, or, in fact, any other psychiatric or psychological tests. *See* CA App. 19 (Oct. 29, 2003 Transcript); *id.* at 40 (Oct. 30, 2003 Transcript) ("I don't do tests."). Instead, Dr. Patterson asked Mr. Wallace a few off-the-cuff questions and determined that a "you got me" smile from Mr. Wallace – a response mechanism entirely consistent with cognitive impairment – was evidence of malingering. *See id.* at 22 (Oct. 29, 2003 Transcript). Dr. Lally, too, testified that Mr. Wallace was malingering even though the two tests he performed on Wallace

showed no sign of fabrication of cognitive impairment. *See* Pet. App. 16a-17a.

Yet, their testimony was not even the most egregious of that presented at Mr. Wallace's competency hearing. Dr. Oliver, a Legal Services Division psychologist who provided the only "neutral" evidence that Mr. Wallace was competent, repeatedly contradicted and recanted his own testimony regarding the testing he performed. Dr. Oliver claimed at the hearing, for example, that he had gleaned a great deal of information from Mr. Wallace during his interview with him, such as the nature of the charge, his identifying information, and his mental health history. *See* CA App. 47, 51a-51b (Oct. 30, 2003 Transcript). However, cross-examination revealed that Dr. Oliver had filled in many sections of his notes before ever speaking with Mr. Wallace. *See id.* at 65 (Nov. 4, 2003 Transcript). Of critical importance to the question of competence, Dr. Oliver first testified that Mr. Wallace told him that the three possible outcomes of a criminal trial were "guilty, not guilty, not guilty by reason of insanity." *See id.* at 50 (Oct. 30, 2003 Transcript). But Dr. Oliver soon confessed that he himself had written those outcomes in his notes before he ever met Mr. Wallace. *See id.* at 66 (Nov. 3, 2003 Transcript).

4. Despite the overwhelming evidence that Mr. Wallace was not competent to stand trial, the trial judge found that the cognitive defects from which Mr. Wallace suffers do not "preclude him from the rational understanding of the charges and proceedings against him." Pet. App. 18a. The court

determined that "the evidence of malingering is far more powerful than the evidence of significant progressive deterioration." *Id.* at 24a. The court thus declared Mr. Wallace competent to stand trial in the case. *Id.* at 93a.

5. Notwithstanding the trial court's views, Mr. Wallace was in fact incapable of assisting his defense team in mounting an effective defense. Left with little choice, Mr. Wallace accepted a guilty plea.[1] Throughout his plea proceeding, Mr. Wallace exhibited behavior indicating his confusion about the meaning of his choice. *See* CA App. 80-81 (Jan. 5, 2004 Transcript). Though the trial court attempted to lead him to the desired answers, Mr. Wallace repeatedly expressed his desire to present an insanity defense and to go to trial. *Id.* at 81-82. He could not understand the difference between a guilty plea and going to trial, and he could not grasp the key concept that a guilty plea meant the government did not have to prove its case against him. *Id.* at 84-85. Despite Mr. Wallace's confusion, the trial court accepted his guilty plea. *Id.* at 92. Apparently concerned that the plea proceeding was inadequate, the court took the unusual step of conducting an additional hearing to bolster the record. *See id.* at 95-98 (Jan. 15, 2004 Transcript). Again, Mr. Wallace demonstrated his confusion and inability to grasp key concepts involved with the waiver of rights that a guilty plea entails. *See id.* Nonetheless, the court sentenced Mr. Wallace to thirty-five years in prison.

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[1] Notably, Mr. Wallace suffered "a major seizure on December 18, 2003," just "eighteen days before his plea hearing." Pet. App. 29a.

See Pet. App. 52a; *see also* CA App. 99-112 (Feb. 27, 2004 Transcript).

6. Mr. Wallace filed a timely notice of appeal, arguing that the court erred in finding that he was competent to stand trial and to enter a guilty plea. He then filed a motion to withdraw his guilty plea, pursuant to District of Columbia Superior Court Rule 32(e), and his appeal was stayed pending the resolution of that motion. The trial court eventually denied Mr. Wallace's Rule 32(e) motion. Mr. Wallace filed a timely appeal of the trial judge's denial of the Rule 32(e) motion, and the two appeals were consolidated.

7. In the decision below, the District of Columbia Court of Appeals denied Mr. Wallace all relief. First, the Court of Appeals determined that Mr. Wallace had waived his right to a direct appeal of the trial court's competency determination when he pled guilty. The Court of Appeals acknowledged that other courts had reached the contrary conclusion, but it declined to follow those courts, concluding that appeals of competency determinations are a "great waste of judicial resources." Pet. App. 6a.

The court determined that this Court's decision in *Pate v. Robinson*, 383 U.S. 375 (1966), merely guaranteed that criminal defendants are "entitled to procedural due process to determine whether [they] are competent," and did not create the right to challenge the outcome of a competency determination. Pet App. 5a n.5. And it found unconvincing the argument that this Court's holdings in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), and *Menna* v. *New York*, 423 U.S. 61 (1975),

mandate that competency determinations cannot be waived by a guilty plea because they go to the "very power of the state 'to hal[e] a defendant into court on a charge.'" Pet. App. 6a-7a n.7 (citing *Menna*, 423 U.S. at 62; *Blackledge*, 417 U.S. at 30-31). The court suggested that while double jeopardy claims go to the government's ability to bring any indictment at all, a competency determination involves "not the government's power to indict but the defendant's ability to assist in his defense at trial or to enter a knowing and voluntary plea." *Id.* Thus, the court refused to consider Mr. Wallace's direct appeal of his competency determination.

Instead, the court determined that Wallace and others similarly situated must advance their claims in a motion to withdraw the guilty plea. The District of Columbia permits the withdrawal of a guilty plea only "to correct manifest injustice." Pet. App. 7a (citing D.C. Super. Ct. Crim. R. 32(e)). This "stringent" test, Pet. App. 7a-8a n.8, places an onerous burden on the defendant; these motions will only be granted where the plea is "fundamentally flawed" such that there has been "a complete miscarriage of justice." *Id.* at 8a n.9 (citation omitted). And the trial court's determinations in this regard are reviewed only for abuse of discretion. Even under this severely restricted scope of review, the Court of Appeals acknowledged that Mr. Wallace's facts presented "a difficult case." Pet. App. 1a. Nevertheless, the Court of Appeals affirmed the trial court's denial of Mr. Wallace's motion. *See id.*

REASONS FOR GRANTING THE WRIT

The state courts and the federal courts are intractably divided over whether a defendant must be allowed to appeal a competency determination after he pleads guilty. The bar against trying an incompetent defendant goes to the heart of the Due Process Clause of the Fifth and Fourteenth Amendments. Given the importance of that right under our criminal justice system, such a conflict is untenable. Furthermore, the decision below conflicts with this Court's clear precedent in *Blackledge* and *Menna* that a guilty plea does not waive the right to appeal constitutional claims that assert "the right not to be haled into court at all," *Blackledge*, 417 U.S. at 30 – situations in which the State may not convict an individual "no matter how validly his factual guilt is established," *Menna*, 423 U.S. at 63 n.2. A criminal defendant's right to appeal a competency determination is such a right. The District of Columbia Court of Appeals' contrary view – that a criminal defendant loses the right to appeal a competency determination after he pleads guilty – denies criminal defendants such as Mr. Wallace their due process right to be tried only when competent. Consequently, the District of Columbia's decision should be reviewed and reversed by this Court.

I. There Is A Deep And Acknowledged Split Over The Question Presented.

The state and federal jurisdictions are divided over whether a defendant may challenge a competency determination after pleading guilty. Several courts have held that a defendant may challenge an unfavorable competency decision after

he pleads guilty. These courts have concluded that while a plea of guilty constitutes a waiver of many rights of appeal, the special nature of the competency requirement demands that a defendant cannot forfeit his right to contest the court's determination, even if he pleads guilty to a charge. Other courts have held that a defendant may not directly appeal a competency determination following a guilty plea. Rather, a defendant's sole avenue of relief is to file a motion to withdraw the guilty plea and demonstrate that a "manifest injustice" warrants withdrawal of the plea, and then to seek appellate review under the highly deferential standards that apply. The difference in the two avenues of review is outcome determinative in many instances, including this case.

1. Several state and federal jurisdictions have held that a defendant does not waive his right under the Due Process Clause of the Fifth and Fourteenth Amendments to appeal directly a competency determination after pleading guilty.

In *People v. Armlin*, 332 N.E.2d 870 (N.Y. 1975), for example, the highest court in New York determined that "the issue of competency to stand trial may be raised on appeal," even after the entry of a guilty plea. *Id.* at 874. The New York Court of Appeals reiterated this holding in *People v. Seaberg*, 541 N.E.2d 1022 (N.Y. 1989), confirming that a defendant "may not waive the right to challenge ... his competency to stand trial," *id.* at 1025 (citing *Armlin*, 332 N.E.2d at 874), even if the defendant explicitly agreed to a waiver of this exact right of appeal. *See also People v. Frazier*, 495 N.Y.S.2d 478, 479 (N.Y. App. Div. 1985) ("A defendant does not

waive the right to a competency hearing by pleading guilty, and may raise for the first time on appeal the issue of capacity to stand trial.").

Likewise, as the D.C. Court of Appeals acknowledged, the Vermont Supreme Court has held that, it, too, would "treat appeals of competency determinations as exceptions to the waiver rule." *State v. Cleary*, 824 A.2d 509, 512 (Vt. 2003). Thus, in Vermont, defendants may seek direct appeal on the issue of competency notwithstanding a guilty plea.

Kentucky similarly has determined that a defendant does not waive this right after he has pled guilty. *See Thompson v. Commonwealth*, 56 S.W.3d 406, 408 (Ky. 2001). Recognizing that the "[c]riminal prosecution of a defendant who is incompetent to stand trial is a violation of due process of law under the Fourteenth Amendment," the *Thompson* court found that even where "defense counsel *conceded* the issue" of defendant's competency during the plea hearing, reviewing courts have the power of direct review over a defendant's appeal asserting his incompetence. *Id.* (emphasis added); *see also Mitchell v. Commonwealth*, No. 2000-CA-001236, 2003 WL 1339283, at *2-*3 (Ky. Ct. App. Feb. 21, 2003) (citing *Thompson* and concluding that defendant did not waive his right to a competency determination when he pled guilty).

These decisions are consistent with the approach taken in numerous other States. In *People v. Parney*, 253 N.W.2d 698 (Mich. Ct. App. 1977), for example, a Michigan court asserted that "[i]t is clear that the United States Supreme Court, while

recognizing that certain rights of defendants may be waived by a subsequent plea of guilty, does not say that is true of all rights." *Id.* at 699 (quotation marks omitted). Those unwaivable rights include constitutional claims "which undercut...the state's authority or ability to proceed with the trial," as those "rights are similar to the jurisdictional defenses in that their effect is that there should have been no trial at all." *Id.* The court found it "unquestionabl[e]" that "the state is powerless to undertake a criminal prosecution of an incompetent defendant." *Id.* As a result, under the Due Process Clause, a "defendant's later guilty plea d[oes] not waive the alleged error arising from the prior competency determination." *Id.* at 699-700; *see also People v. White*, 308 N.W.2d 128, 139 (Mich. 1981) (noting that "where a claim is one that the state may not prosecute regardless of defendant's factual guilt, a guilty plea does not waive the right to subsequently raise that claim").

Likewise, in *State v. Wead*, 609 N.W.2d 64 (Neb. Ct. App. 2000), "bear[ing] in mind the sanctity of constitutional protections and the need to guard against constitutionally infirm convictions," *id.* at 68 (citing *State v. Johnson*, 551 N.W.2d 742, 758 (Neb. Ct. App. 1996)), the court determined that "a defendant's guilty plea...does not preclude the defendant from raising on direct appeal the issue of competency to plead or stand trial." *Id.* The Nebraska Supreme Court implicitly endorsed this conclusion, as it considered in *State v. Lassek*, without hesitation, a defendant's competency appeal

after he entered a plea of no contest. 723 N.W.2d 320, 324-26 (Neb. 2006).

Federal courts have determined, too, that a defendant may appeal his competency, notwithstanding his entry of a guilty plea. The Southern District of New York remarked that the notion that a defendant waives "his mental competency claim upon entry of a guilty plea" is "fundamentally flawed." *King v. Cunningham*, 442 F. Supp. 2d 171, 185 (S.D.N.Y. 2006). The court explained that "'[c]ompetency' and 'knowing and intelligent' waiver[s] are two separate inquiries, both necessary components of a valid guilty plea." *Id.* (citing *Godinez v. Moran*, 509 U.S. 389, 400 (1993)). Consequently, appeals directly concerning a competency determination must be distinct from those considering a denial of a motion to withdraw a guilty plea; the latter focuses on the "knowing and intelligent" inquiry, while the former goes directly to competency to stand trial.

2. The decision of the D.C. Court of Appeals here conflicts directly with these decisions. As noted, the Court of Appeals observed that, with the exception of issues concerning "the exercise of jurisdiction by the trial court and the legality of the sentence imposed," Pet. App. 5a (citation omitted), "virtually every possible avenue of appeal is waived by a guilty plea," *id.* Recognizing that some courts have found competency determinations to be exceptions to the waiver rule, *id.* at 6, the District of Columbia

"refused" to do so.[2] *Id.* Instead, the court held that the defendant's only avenue of redress is a "Rule 32(e) motion to withdraw" his guilty plea, which "attack[s] the voluntary and intelligent nature *of the plea.*"[3] *Id.* (emphasis added). As the court acknowledged, relief under Rule 32(e) is severely constrained. Such relief is available "only 'to correct manifest injustice,'" *id.* at 7 (citing D.C. Super. Ct. Crim. R. 32(e)), and the defendant "must establish either that there was a fatal defect" in the plea proceeding or that "'justice demands withdrawal.'" *Id.* (internal citation omitted).

Although the D.C. Court of Appeals' approach conflicts with that adopted by most courts to have expressly considered the issue, it is consistent with the approach taken in some other jurisdictions. In *Tillman v. State*, 570 S.W.2d 844 (Mo. Ct. App. 1978), for example, the Missouri Court of Appeals considered a defendant's claim – after he had pled guilty – "that the psychiatric reports were insufficient in that the examining psychiatrist failed to determine his mental deficiency," thus placing the court's assessment of competency in doubt. *Id.* at

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[2] The court specifically highlighted Vermont and Michigan as jurisdictions that have found the issue of competency an exception to the general waiver rule. *See* Pet. App. 6a & n.6.

[3] District of Columbia Rule 32(e) reads: "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." D.C. Super. Ct. Crim. R. 32(e).

846. Finding the claim "a mere trial error," the court held that the "movant's plea of guilty waived any and all alleged procedural infirmities antedating the plea." *Id.* The court concluded that "[a]ny contentions regarding the sufficiency of the psychiatric examinations" should have been made before the plea, or not at all. *Id.*

The Florida Supreme Court has signaled that it, too, believes that a guilty plea destroys a defendant's ability to appeal directly a vast majority of claims, including a competency determination. In *Robinson v. State*, 373 So. 2d 898 (Fla. 1979), the court recognized that "[t]here is an *exclusive* and limited class of issues which occur contemporaneously with the entry of the plea that may be the proper subject of an appeal." *Id.* at 902 (emphasis added). Notably, competency determinations were not included on the court's exclusive list. Rather, only claims asserting subject matter jurisdiction, the illegality of a sentence, the government's failure to adhere to a plea agreement, and the voluntary and intelligent character of the plea may form the basis of a direct appeal after a guilty plea.[4] *Id.*

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[4] Jurisdictions on the other side of the debate show no sign of a change of heart. The law in Michigan and New York, for example, has been steady since the 1970s. *See Parney*, 253 N.W.2d at 699-700; *Armlin*, 332 N.E.2d at 874. And the Southern District of New York has remarked that the notion that one waives this right of appeal after a guilty plea is "fundamentally flawed." *Cunningham*, 442 F. Supp. 2d at 185. There is little chance that either side will reconsider this question absent action by this Court.

II. The Decision Below Conflicts With This Court's Decisions And Betrays The Promises Of The Right To Due Process.

Certiorari is also warranted because the decision below conflicts with this Court's decisions, which establish that the Due Process Clause requires that defendants be permitted to appeal directly a competency determination after a guilty plea.

1. In *Pate v. Robinson*, this Court held that "the conviction of an accused person while he is legally incompetent violates due process." 383 U.S. 374, 378 (1966). And, to ensure that States guard this right, "state procedures must be adequate to protect" it. *Id.*

While a defendant forfeits many important constitutional rights when he pleads guilty, this Court's jurisprudence confirms that the right to be tried only when competent is not among them. In *Blackledge v. Perry*, this Court considered whether a defendant waives the right to pursue a constitutional double jeopardy claim after he pleads guilty. 417 U.S. 21, 29 (1974). The Court noted that when a criminal defendant enters a guilty plea, he forfeits the right to complain of "antecedent constitutional

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Further, there is no recent trend towards a particular view. Vermont, for example, determined in *Cleary* in 2003 that it will "treat appeals of competency determinations as exceptions to the waiver rule," 824 A.2d at 512, while the District of Columbia recently came to the opposite conclusion in the present matter. Considering these recent, opposing decisions, there is no benefit to further percolation, as this entrenched and intractable split will not be settled without this Court's review.

violations" through direct appeal. *Id.* at 30 (citing *Tollett v. Henderson*, 411 U.S. 258 (1973)). The forfeited rights, however, cannot go "to the very power of the State to bring the defendant into court to answer the charge brought against him." *Id.* at 30. Thus, while a defendant gives up his right to appeal a coerced confession, for example, *see id.*, he does not give up the guarantee of an appeal for the "distinctive" rights barring "[t]he very initiation of the proceedings against him." *Id.* at 30-31. The due process prohibition against double jeopardy is one of those rights, for "its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." *Id.* (quotation marks omitted).

This Court's decision in *Menna v. New York*, 423 U.S. 61 (1975), in which the Court again held that a guilty plea does not waive a double jeopardy claim, is to the same effect. In *Menna*, this Court explained that "a counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case." *Id.* at 63 n.2. As a result, any claim on appeal that would go towards the factual guilt of the defendant is waived by a guilty plea. However, where "the claim is that the State may not convict [the defendant] no matter how validly his factual guilt is established," a guilty plea does not bar direct appeal. *Id.* Thus, a guilty plea does not waive a claim – like a double jeopardy claim – that contends that "the charge is one which the State may not constitutionally prosecute." *Id.*

2. For the very reasons that defendants do not waive their right to a double jeopardy claim after a guilty plea, the Due Process Clause does not permit such a waiver of claims concerning competency determinations. Competency determinations, like double jeopardy, go to the very power of the government to force a defendant to answer to a charge. When a defendant is deemed incompetent, the determination "prevent[s] a trial from taking place at all," just as a valid double jeopardy claim bars initiation of proceedings. *Blackledge*, 417 U.S. at 30-31 (quotation marks omitted).[5]

In addition, whether a defendant is competent to stand trial is entirely separate from the question of his factual guilt. Even if there is incontrovertible evidence that a defendant is guilty, the government may not initiate proceedings against him if he is incompetent. Thus, because a guilty plea "simply renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt and which do not stand in the way of conviction if factual guilt is validly established," *Menna*, 423 U.S. at 62-63 n.2, the right to claim incompetence to stand trial – like the right to assert a double jeopardy violation – survives a guilty plea. The D.C. Court of Appeals' contrary conclusion cannot be squared with this Court's clear directives

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[5] *See also United States v. Broadus*, 450 F.2d 639, 641 (D.C. Cir. 1971) (permitting a defendant who had entered a guilty plea but later asserted that the statute under which he was prosecuted had been found unconstitutional prior to his plea to raise that contention on appeal because "the guilty plea should not be allowed to accomplish what the Government could not constitutionally accomplish").

and with the guarantees of the Due Process Clause of the Fifth and Fourteenth Amendments.[6]

III. The Conflict Is Recurring And Important.

There can be no question that this conflict matters to criminal defendants like Wallace and to the integrity of our judicial system at large.

1. This Court's decision in *Drope v. Missouri*, 420 U.S. 162 (1975), makes clear that the prohibition on trying an incompetent person is fundamental to an adversarial system. *Id.* at 171-72. The trial of an incompetent person is akin to the repugnance of a trial in absentia; an incompetent person, for all intents and purposes, is not present in the courtroom in a legally meaningful sense, for he "is in reality afforded no opportunity to defend himself." *Id.* at 171. He cannot understand the meaning of the proceedings against him. He is unable to assist his lawyer in the preparation of his defense – a disability that inevitably taints the reliability of the outcome. *See* Richard J. Bonnie, *The Competence of Criminal Defendants With Mental Retardation To Participate In Their Own Defense*, 81 J. Crim. L. & Criminology,

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[6] The D.C. court attempted to distinguish *Menna* and *Blackledge* by claiming that those cases involved the government's very power to indict, while the question presented herein involved a different matter – "the defendant's ability to assist in his defense at trial or to enter a knowing and voluntary plea." *See* Pet. App. 7a n.7. But that description trivializes and misconstrues the right at issue. As this Court made clear in *Pate*, Due Process deprives the State of the power to try one who is incompetent, and thus, for purposes of determining whether a guilty plea waives the right to appeal, competency claims and double jeopardy claims stand on the same footing.

419, 427 (1990). And finally, he is unable to exercise the judgment needed to make the decisions that this Court has held must be made by the defendant himself in a criminal proceeding. *See e.g.*, *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987) (whether to testify); *Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966) (whether to plead guilty); *Adams v. United States ex rel. McCann*, 317 U.S. 269, 275-77 (1942) (whether to waive a jury trial). When a defendant's competency is in question, such that he cannot reliably be said to possess the ability to play these roles within the proceeding against him, our adversarial system fails.

2. Requiring a defendant to proceed through a motion to withdraw a guilty plea, rather than a direct appeal has a real and substantial effect on the defendant's ability to vindicate this fundamental right.

The root of the defendant's burden lies in the decision forming the basis of the court's review on appeal; in the jurisdictions that permit direct appeal, the initial competency determination – and not the guilty plea – forms the basis of review. The initial competency inquiry is governed by the standard announced by this Court in *Dusky v. United States*, 362 U.S. 402 (1960). For a criminal defendant to be competent to stand trial or plead guilty, he must possess a "rational as well as a factual understanding of the proceedings against him," *id.* at 402, a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," *id.*, and the ability "to assist in preparing his defense." *Drope*, 420 U.S. at 171; *see also Godinez*, 509 U.S. at 397-98 (holding that the

competency standard for pleading guilty is the same as the competency standard for standing trial). The competency question is resolved by a simple preponderance of the evidence. *See Cooper v. Oklahoma*, 517 U.S. 348, 355 (1996) (holding that a defendant may not be required to stand trial where he has shown it is more likely than not that he is incompetent to stand trial).

In contrast, in jurisdictions such as the District of Columbia that preclude direct appeal, it is the motion to withdraw a guilty plea that is under review. The defendant's burden in such a motion is severe. In the District of Columbia, for example, "[a] guilty plea may be withdrawn after sentencing only if the defendant affirmatively establishes that the trial court's acceptance of her plea was *manifestly unjust*, and that the plea proceeding was *fundamentally flawed* such that there was a *complete miscarriage of justice*." *Johnson v. United States*, 631 A.2d 871, 874 (D.C. 1993) (emphasis added). District of Columbia courts acknowledge that this is a "high standard." *See Southall v. United States*, 716 A.2d 183, 188 (D.C. 1998); *see also* Pet. App. 7a n.8 (describing the manifest injustice standard as "stringent").[7]

Thus, the defendant proceeds to appeal in each instance with a very different sort of determination under review. On direct appeal, the question is whether the defendant was competent; on review of

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[7] Missouri and Florida, too, permit a defendant to withdraw his guilty plea only upon a showing of "manifest injustice." *See, e.g., Elam v. State*, 210 S.W.3d 216, 217 & n.1 (2006) (citing Mo. R. 29.07(d)); *Williams v. State*, 316 So. 2d 267, 273 (Fla. 1975).

denial of the Rule 32(e) motion, the question is whether there was a manifest injustice. And because the trial court considers a Rule 32(e) motion with a strong presumption against granting it, individuals such as Mr. Wallace face a double hurdle on appeal that all but forecloses the possibility of prevailing, even in cases such as Mr. Wallace's in which there is strong evidence of incompetence. In short, review of a denial of a Rule 32(e) motion is not an adequate replacement for direct review.

3. Not only is this right important, its denial has potentially great reach. A vast majority of criminal defendants choose to plead guilty, rather than face a trial. In 2004, for example, 95% of felony convictions in state courts resulted from a guilty plea. *See* U.S. Dep't of Justice: Office of Justice Programs, Sourcebook of Criminal Justice Statistics 2004 Table 5.46.2004, available at http://www.albany.edu/sourcebook/pdf/t5462004.pdf. It follows that a high number of defendants whose competency is in question ultimately will face the choice of whether to plead guilty, and statistics support the conclusion that many will "choose" this option. Thus, whether a defendant may directly appeal his competency determination after a plea of guilty is a question that has the potential to affect in a serious way a large number of criminal defendants.

Finally, this issue critically affects not only the defendants themselves, but also their attorneys. If a lawyer believes her client to be incompetent, regardless of the trial court's determination on the issue, she is presented with an impossible dilemma in jurisdictions following the District of Columbia

rule.[8] An attorney may be tempted to advise her client to accept a plea bargain where the attorney doubts that the client will be able to adequately assist in his defense at trial. Yet, the attorney must do so knowing that a guilty plea will destroy the defendant's right to appeal the competency determination – a particularly vexing situation when the attorney believes the decision was erroneous.[9]

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[8] According to one study, "attorneys have some doubt about the mental capacity of their clients in eight to fifteen percent of felony cases." *See* Richard J. Bonnie, et al., *Decision-Making in Criminal Defense: An Empirical Study of Insanity Pleas and the Impact of Doubted Client Competence*, 87 J. Crim. L. & Criminology 48, 49-50 (1996). This statistic is even higher when considering criminal proceedings in which the defendant's competency has been formally put into question: In a study of the cases of 139 criminal defendants – 89% of whom were sent for pre-trial evaluation for competence to stand trial – almost three-quarters of the trial attorneys reported that they had doubts about their clients' ability to participate in his own defense, regardless of the official determination of competency. *Id.* at 52-53. Thus, the dilemma attorneys may face is a real, substantiated problem.

[9] Particular concerns with potentially incompetent defendants pleading guilty include the distinct possibility that admissions made in the course of the plea may not be reliable and that the defendant may not be capable of making "sufficiently autonomous" decisions. Bonnie, *Competence of Criminal Defendants*, 81 J. Crim. L. & Criminology *at* 436-37. A defense lawyer's decision whether to recommend acceptance of a plea is further complicated by the fact that, after a defendant is found competent, his statements during interviews by the government's mental health experts may be used against him at trial. *See, e.g.*, D.C. Code § 24-531.10.

On the other hand, the attorney may advise her client to proceed to trial, with a defendant she believes to be minimally competent, in large part to preserve her client's right to a direct appeal of the competency determination. In this scenario, the defendant's right of appeal is secure. Yet, because the client's ability to assist in his defense is impaired, the attorney will be severely limited in her ability to conduct an adequate defense. The possibility of an unfavorable result is real, particularly when compared to the potentially more lenient plea offer the defendant has foregone.

In short, a rule barring direct appeal of competency determinations forces criminal attorneys to walk a fine line that has immeasurable implications for defendants' rights – a situation this Court should not condone.

IV. This Case Presents An Ideal Vehicle To Resolve The Issue.

This case presents an ideal vehicle to resolve this split and to correct the erroneous position held by the court below. The issue was squarely presented below and decided by the District of Columbia courts. Further, the evidence of incompetence was strong, indeed overwhelming. *See e.g.*, Pet. App. 1a (noting that this is a "difficult case"). Thus, Mr. Wallace's ability to appeal directly his competency determination was critical, and, in fact, outcome determinative. Had Mr. Wallace pled guilty in Vermont or Michigan, for example, he would have received a direct review of his competency determination. And in that direct review, the court

would have considered whether the vast evidence of his mental deficits demonstrated that Mr. Wallace was, in fact, incompetent to stand trial. *See Godinez*, 509 U.S. at 400-01; *Drope*, 420 U.S. at 171; *Dusky*, 362 U.S. at 402.

As overwhelming evidence demonstrates, Mr. Wallace is incompetent under the *Dusky* standard due to a lifetime of diabetic comas and epileptic seizures that have damaged his brain to the point where he cannot rationally or factually understand a criminal proceeding against him, or assist in his own defense in a meaningful way. His results on the Wechsler Adult Intelligence Scale, 3d Edition, a test of general intellectual functioning, are telling. The test was administered under the supervision of Dr. Sidney Binks, a government neuropsychologist with no stake in the trial and no incentive to distort the outcome in either way. *See* Pet. App. 112a-13a. Mr. Wallace's IQ, was only 55 – in the "severely impaired range." *Id.* This result means that Mr. Wallace does not even rank in the first percentile of all individuals.[10] *Id.* Sub-tests found that Mr. Wallace is largely incapable of listening to a spoken word, understanding what it means, remembering it, and developing a meaningful response. *See id.* This disability prevents Mr. Wallace from developing a "rational as well as factual understanding of the

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[10] Numerous courts have concluded that defendants with scores *higher* than Mr. Wallace's are incompetent. *See, e.g., State v. Garfoot*, 558 N.W.2d 626 (Wis. 1997) (defendant with IQ of 64 found incompetent to stand trial); *State v. Augustine*, 215 So. 2d 634, 637 (La. 1968) (defendant had "actual brain damage" and an IQ of 57).

proceedings" and from assisting counsel in a meaningful manner. *Dusky*, 362 U.S. at 402.

In addition to Dr. Binks and two experts retained by Mr. Wallace, no fewer than five neutral government experts independently found Mr. Wallace incompetent to stand trial. *See* CA App. 113-15 (Letter from Dr. Boss); *id.* at 116-119 (Letter from Dr. Piquet); *id.* at 120-21 (Letter from Mr. Henneberry and Dr. Montalbano); *id.* at 131-32 (Certificate from Dr. Hugonnet). Further, *the prosecution's own experts* conceded that Mr. Wallace suffers from cognitive impairments. Dr. Stephen Lally, for example, performed a test on Mr. Wallace that "showed he was performing in the moderate to severely impaired range." Pet. App. 16a. Another conceded that Mr. Wallace's debilitating conditions could have caused brain damage and that Mr. Wallace "has a dementia." CA App. 41 (Oct. 30, 2003 Transcript).

The trial court, however, looked past this substantial evidence and determined instead that Mr. Wallace was malingering. *See* Pet. App. 92a-93a. This determination flies in the face of the analysis of trained medical professionals and reliable scientific tests. Mr. Wallace's EEG, for example, confirmed that Mr. Wallace exhibits "markedly abnormal brain wave activity, with slowing over the frontal lobes," CA App. 181 (Letter from Dr. Hyde), and "[g]eneralized slowing consistent with a diffuse disorder or cerebral dysfunction or encephalopathy related to a toxic metabolic, degenerative, infectious, inflammatory or other system process." *Id.* at 190 (Transfer Summary Update by Dr. Shine). As one

expert explained, "there's no way you can fake or malinger an abnormal EEG." *Id.* at 7 (October 28, 2003 Transcript). Tests administered by the government's own witnesses confirmed the real nature of Mr. Wallace's significant impairment and the conclusion that he was *not* malingering. *See* Pet. App. 88a-89a.

Had the reviewing court been able to examine the undisputed scientific evidence of Mr. Wallace's brain damage and severely impaired cognitive functioning and the preponderance of expert opinion that Mr. Wallace was incompetent on a direct appeal *of the competency determination itself*, rather than a review of the trial court's denial of Mr. Wallace's motion to withdraw his guilty plea, it likely would have found Mr. Wallace incompetent. The law of the District of Columbia, however, prevents this review from ever occurring. This practice, contrary to the law of several other jurisdictions and to this Court's precedent, betrays the promise of Due Process and strips Mr. Wallace of his right to be tried only when competent.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

District Columbia Court of Appeals
Eric R. WALLACE, Appellant,
v.
UNITED STATES, Appellee.

Nos. 04-CF-298, 05-CO-1328

Before FARRELL, RUIZ and THOMPSON, Associate Judges.

Thompson, Associate Judge:

After accepting a guilty plea from appellant Eric R. Wallace, the trial court found Wallace guilty of second-degree murder and sentenced him to thirty-five years in prison, to be followed by five years of supervised release. Wallace contends that the court erred in finding that he was competent to stand trial and to enter a guilty plea, and that the trial judge abused her discretion in denying his motion to withdraw his guilty plea. He argues in the alternative that his sentence must be vacated because it was based on uncorroborated and unreliable information.

We agree with the trial judge that this is a difficult case. However, finding no clear error or abuse of discretion in the court's rulings, we affirm Wallace's conviction and deny the requested relief.

Background

During early 2002, doctors at St. Elizabeths Hospital found appellant incompetent to stand trial in three misdemeanor assault cases that were then pending. The government thereafter petitioned to have appellant civilly committed. Appellant opposed the government's request that he be held at St. Elizabeths pending resolution of the commitment petition, and he was released on October 10, 2002. Later that same day, appellant encountered Claude McCants at 1108 4th Street, N.E., stabbed McCants in the neck, and drove away in McCants' vehicle, leaving McCants to bleed to death.

Relying on a court-ordered competency screening completed in November 2002, the court found appellant competent to stand trial for the murder of McCants. The court also ordered a criminal responsibility study, the results of which were summarized in a June 2003 report that concluded that "on or about October 10, 2002, ... [appellant] was not suffering from a mental disease or defect that substantially impaired his ability to appreciate the wrongfulness of his conduct or his ability to conform his conduct to the requirements of the law." Notwithstanding, on August 12, 2003, appellant filed a motion asking the court to find him incompetent to stand trial and a notice of intent to rely on the insanity defense. In response, the court ordered the Legal Services Division of the Forensic Services Administration[1] to render an opinion as to the

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[1] As explained by Dr. Lawrence Oliver, a clinical psychologist employed by the Legal Services Division, the Division is "an

"present mental competency of [appellant] to stand trial."

Dr. Oliver performed the competency examination. In a letter dated September 29, 2003, he reported that although appellant "claimed to have no knowledge whatsoever of the judicial process and the roles of various court officials," his "presentation today appeared to be completely volitional." Dr. Oliver concluded that appellant was malingering.[2] After receiving his report, the court scheduled a competency hearing, which was conducted over a five-day period between October 28 and November 4, 2003. Having heard the testimony of five expert witnesses and reviewed numerous written reports about appellant's mental status, the court ruled on November 10, 2003 that appellant was competent to stand trial.

When the parties were before the court again on January 5, 2004 — the date set for commencement of trial-defense counsel informed the court that appellant "indicated again last night that he would

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agency that was established by an order of Congress to assist the court in issues of competency [and] criminal responsibility."

[2] Malingering is "the willful, deliberate, and fraudulent feigning or exaggeration of the symptoms of illness or injury, done for the purpose of a consciously desired end." DORLAMD'S ILLUSTRATED MEDICAL DICTIONARY 771-72 (26th ed. 1981). The desired end can be "avoiding military duty, avoiding work, obtaining financial compensation, evading criminal prosecution, or obtaining drugs." DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 739 (4th ed. 2000).

like to accept the Government's plea offer." After a colloquy that resulted in the court's finding that appellant "understands the proceedings and is competent to proceed," the court accepted appellant's unconditional plea of guilty to one count of Second Degree Murder While Armed. At a *Frendak*[3] hearing on January 15, 2004, the court also found that appellant "understands the consequences of the choice to waive the [insanity] defense" and that his "waiver is voluntary and intelligent." The court sentenced appellant on February 27, 2004, and appellant filed his notice of appeal on March 26, 2004. On August 19, 2004, he also moved to withdraw his guilty plea, and his appeal was stayed pending resolution of that motion. By order dated October 27, 2005, the trial court denied the motion to withdraw and appellant noted an appeal from the denial order. We consolidated the two appeals.

Analysis

I.

The government urges that we must dismiss appellant's direct appeal. We agree that our case law requires this result. We have said that "as a practical matter virtually every possible avenue of appeal is waived by a guilty plea," *Bettis v. United States,* 325

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[3] *See Frendak v. United States*, 408 A.2d 364 (D.C. 1979). Through a Frendak inquiry, the trial court must assure itself that the defendant understands the consequences of failing to assert the insanity defense, is fully informed of the alternatives available, and freely chooses to waive the insanity defense. *See id.* at 380.

A.2d 190, 194 (D.C. 1974), and that "the only issues that are appropriately raised in an appeal from a conviction entered after a guilty plea are the exercise of jurisdiction by the trial court and the legality of the sentence imposed." *Carmichael v. United States,* 479 A.2d 325, 326 n.1 (D.C. 1984) (citing *Lorimer v. United States,* 425 A.2d 1306, 1308 (D.C. 1981) (per curiam)). We have recognized that "a defendant who is sentenced after pleading guilty may later attack the voluntary and intelligent character of the plea," *McClurkin v. United States,* 472 A.2d 1348, 1352 (D.C. 1984), but have held that "the appropriate method for challenging the voluntary and intelligent character of a guilty plea is by a Rule 32(e) motion to withdraw."[4] *Lorimer,* 425 A.2d at 1309.[5]

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[4] Super. Ct. Crim. R. 32(e) provides that: A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea. *Id.*

[5] Appellant argues that the preclusion of his direct appeal amounts to a holding that he waived the issue of competence, a result that he contends conflicts with the Supreme Court's admonition, in *Pate v. Robinson,* 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966), that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his [competence]." *Id.* at 384. In *Pate,* however, the Supreme Court was concerned with "the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial," a deprivation of due process. *In re W.A.F.,* 573 A.2d 1264, 1266 (D.C. 1990). In other words, *Pate* established that a defendant is entitled to procedural due process to determine whether he is competent. Here, appellant does not assert that procedural protections were lacking; we

As appellant points out, some jurisdictions have determined to "treat appeals of competency determinations as an exception to the ... rule" that "a voluntary guilty plea waives all nonjurisdictional defects in the proceedings leading up to the plea." *State v. Cleary,* 175 Vt. 142, 824 A.2d 509, 512 (Vt. 2003).[6] This court, by contrast, has "refus[ed] to exercise our jurisdiction to hear a challenge to a guilty plea" outside the context of an appeal from denial of a motion to withdraw a guilty plea, *Lorimer,* 425 A.2d at 1309 n.6, with the objective of "reduc[ing] the great waste of judicial resources required to process frivolous attacks on guilty plea convictions." *Id.* (internal quotation and citation omitted).[7] Even were we free to depart from that

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think he could not legitimately do so, as the court ordered two competency assessments and conducted an extended competency hearing, at which the trial judge repeatedly gave counsel latitude to pursue questioning and took pains not to "squeeze anybody out." Appellant's challenge is rather to the *outcome* of the competency determination. Nothing in *Pate* compels a holding that a defendant who has received the benefit of such proceedings must be allowed to challenge his competency again on direct appeal following a guilty plea.

[6] Other courts have reasoned that because a defendant's mental incompetence undercuts a state's authority to proceed to trial, a claim that the defendant was incompetent is a claimed jurisdictional defect that is not waived by a guilty plea. *See, e.g. People v. Parney,* 74 Mich. App. 173, 253 N.W.2d 698, 699-700 (Mich. Ct. App. 1977) ("[D]efendant's later guilty plea did not waive the alleged error arising from the prior competency determination.").

[7] Appellant suggests that this court's approach is inconsistent with *Menna v. New York,* 423 U.S. 61, 96 S. Ct. 241, 46 L. Ed.

practice in this case, we would have no reason to do so, because, as noted, appellant did in fact move in the trial court for leave to withdraw his plea, and we have before us his appeal from the trial court's decision denying that motion.

After the imposition of sentence, as in this case, a court will allow the withdrawal of a guilty plea only "to correct manifest injustice...." Super Ct. Crim. R. 32(e).[8] To meet this burden, appellant must

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2d 195 (1975). Menna was indicted for and pled guilty to refusing to answer questions before a grand jury after he had already been sentenced to a jail term for civil contempt for the same refusal to testify. The Supreme Court reversed his conviction, reasoning that where "the claim is that the State may not convict petitioner no matter how validly his factual guilt is established," a "guilty plea ... does not bar the claim," *id.* at 63, and admonishing that "[w]here the State is precluded by the [double jeopardy clause of the] United States Constitution from haling a defendant into court on a charge, federal law requires that a conviction on that charge be set aside even if the conviction was entered pursuant to a counseled plea of guilty." *Id.* at 62. However, *Menna* involved the very power of the state to "hal[e] a defendant into court on a charge." *Menna,* 423 U.S. at 62; *see also Blackledge v. Perry,* 417 U.S. 21, 94 S. Ct. 2098, 40 L. Ed. 2d 628 (1974), a case where "the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all" and the "very initiation of proceedings against [the defendant] ... operated to deny him due process of law." *Id.* at 30-31. By contrast, when a defendant's competency is in issue, the issue is not the government's power to indict but the defendant's ability to assist in his defense at trial or to enter a knowing and voluntary plea. *Menna* and *Blackledge* do not dictate that in this circumstance the defendant must be able to bring a freestanding appeal of the competency determination as though he had never pled guilty.

[8] *See Edwards v. United States,* 766 A.2d 981, 988 n.10 (D.C.

establish either that "there was a fatal defect in the Rule 11 [plea] proceeding when the guilty plea was taken," or that "justice demands withdrawal under the circumstances of the case." *Pierce v. United States,* 705 A.2d 1086, 1089 (D.C. 1997).[9] We review a trial court order denying a Rule 32(e) motion to withdraw a guilty plea for abuse of discretion. *See Carmichael,* 479 A.2d at 327. In light of the procedural history of this case, our review here will

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2001) (noting that a post-sentencing motion to withdraw a guilty plea is reviewed under the stringent "manifest injustice" standard rather than under the more liberal "if for any reason the granting of the privilege seems fair and just" standard applicable to a pre-sentencing motion to withdraw a plea); *Binion v. United States,* 658 A.2d 187, 191 (D.C. 1995) (same). We have held that "[i]f it appears that a defendant [who has filed a Rule 32(e) motion] ... did not knowingly plead, then 'manifest injustice' warranting withdrawal of the plea will generally be found." *Carmichael,* 479 A.2d at 327. We have also recognized that "[a] defendant's mental competency," one of the issues that appellant raises here, is "closely related to his ability knowingly to enter a plea." *Id.*

[9] Elsewhere we have said that both prongs of this test must be met: "In order to withdraw a plea, the movant must not only demonstrate that the plea was manifestly unjust, *but must also show* that 'the plea proceeding was fundamentally flawed such that there was a complete miscarriage of justice.'" *Edwards,* 766 A.2d at 987 (emphasis added) (quoting *Williams v. United States,* 656 A.2d 288, 293 (D.C. 1995). We need not resolve which articulation is the more accurate statement of the law because, as explained *infra,* we conclude (with some difficulty) that appellant has not met either prong of the test.

largely entail application of a "clear error" standard, as we now explain.[10]

Appellant first attempts to meet the burden of establishing that "justice demands withdrawal" of his guilty plea by showing that he was mentally incompetent at the time of the plea. *See Willis v. United States,* 468 A.2d 1320, 1323 (D.C. 1983) ("Having failed to show that he was mentally incompetent, [appellant] has also failed to meet his burden of proving manifest injustice."). He attempts to make that showing by challenging the validity of the trial court's determination that he was competent to stand trial. *See Godinez v. Moran,* 509 U.S. 389, 400-01, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993) (holding that the competency required to plead guilty is the same as the competency required for standing trial). Accordingly, we are compelled to consider whether the trial court's November 10, 2003 competency determination is "supported by the record," *Bennett v. United States,* 400 A.2d 322, 325 (D.C. 1979), or whether the trial court clearly erred when it determined on November 10, 2003 that appellant was competent to stand trial[11] (or when it

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[10] *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 110 L. Ed. 2d 359 (1990) (noting that a court "would necessarily abuse its discretion if it based its ruling on ... a clearly erroneous assessment of the evidence").

[11] "A finding of competency will not be set aside upon review unless it is clearly arbitrary or erroneous." *Bennett,* 400 A.2d at 325 (internal quotation marks and citation omitted). The "clearly erroneous" standard applies because a trial court's competency determination is largely a factual determination, *see United States v. Izquierdo,* 448 F.3d 1269, 1278 (11th Cir.

relied on that conclusion in accepting Wallace's guilty plea on January 5, 2004, without any further hearing on competency).

Appellant next argues that the Rule 11 plea proceeding was defective because, regardless of his mental competency, he did not actually understand the significance of the proceeding and the rights he was waiving. We therefore have the task of determining whether the trial court clearly erred in finding that appellant made his guilty plea knowingly.[12] *See Johnson v. United States*, 631 A.2d 871, 878-79 (D.C. 1993) (Farrell, J., concurring) (noting that the clear error standard prescribed by D.C. Code § 17-305(a) applies to review of the trial

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2006) ("A [trial] court's competency determination is primarily factual in nature.") and *United States v. Villegas*, 899 F.2d 1324, 1341 (2d Cir. 1990) ("A defendant's competence to stand trial is a question of fact ...."), which must be accorded "great deference." *Bennett*, 400 A.2d at 325.

[12] As appellant notes, "[t]he focus of a competency inquiry is the defendant's mental capacity [*i.e.*,] whether he has the ability to understand the proceedings." *Godinez*, 509 U.S. at 401 n.12 (emphasis removed). The focus of a Rule 11 " 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand...." *Id.* (emphasis in original); *see also id.* at 400-01 ("In addition to determining that a defendant who seeks to plead guilty ... is competent, a trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.... In this sense there is a 'heightened' standard for pleading guilty ..., but it is not a heightened standard of competence."(internal citations and emphasis omitted)).

judge's findings based on a defendant's statements during a plea inquiry).

II.

As already noted, appellant contends that "justice demands withdrawal" of his guilty plea because of his lack of mental competency. He argues that the evidence presented at his competency hearing-his diagnoses of cognitive impairment and "dementia due to seizure disorder and insulin-dependent diabetes," and the fact that "six different doctors independently determined that [he] was not competent to stand trial" — either taken alone or viewed in conjunction with post-competency-hearing evidence presented with his motion to withdraw, compels a conclusion that he was incompetent to stand trial and to plead. We consider these arguments in section II .A. *infra.*

Appellant also asserts that he "was obviously confused throughout the plea proceedings" and that the trial judge abused her discretion, both in accepting his guilty plea and in denying his motion to withdraw the plea, in the face of his repeated assertions about self-defense, lack of excessive force, and the insanity defense. We address these arguments in section II.B. *infra.*

A. Appellant's Competence to Stand Trial or Plead Guilty

"Constitutional due process requires that a criminal defendant be mentally competent for a trial to proceed." *Higgenbottom v. United States,* 923 A.2d 891, 897 (D.C. 2007) (citation omitted). In a

competency proceeding, the relevant inquiry is whether a defendant has a rational and factual understanding of the proceedings against him and whether he can consult with his lawyer and assist in preparing his defense. *See id.; see also Dusky v. United States,* 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960) (per curiam) (establishing the requirements of rational and factual understanding and competent consultation with a lawyer) and *Drope v. Missouri,* 420 U.S. 162, 171, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975) (requiring a defendant to be able to "assist in preparing his defense").

a. Evidence Presented at the Competency Hearing

At the competency hearing in this case, appellant presented evidence that he had long suffered from Type I diabetes, causing him to experience erratic and abnormal swings in his blood sugar, and that he also had a long history of epileptic seizures. Dr. Thomas Hyde, a board-certified neurologist who examined and tested appellant on April 23, 2002, and October 6, 2003, testified that "due to poorly controlled seizures and repeated hypoglycemic insults to the brain over the years," appellant was in a "cognitively impaired state" and had "significant impairment in neurological function, especially in domains of attention and memory" that "would impair his ability to understand the proceedings that he would be involved with, and to participate and work with his counsel in an effective manner" and that "render him incompetent from the medical/legal standpoint." Dr. Hyde also testified that appellant's

"Full Scale IQ was found to be 55" and that "people who are below 60 are really quite significantly impaired."

Dr. David Pickar, a psychiatrist,[13] met with appellant on three different occasions-January, April, and September of 2003. He testified that appellant demonstrated perseveration, a symptom of frontal lobe dysfunction. Dr. Pickar also testified that during his September 2003 evaluation of appellant, he explored at some length appellant's understanding of the legal process. He found appellant "unable to understand the fundamental nature of the defense-prosecution, defendant relationship" and "[u]nable to understand relationship with defense attorney." Dr. Pickar did not think that appellant "got [*i.e.,* comprehended] the idea of pleading guilty." Dr. Pickar concluded that appellant "does not have sufficient understanding of the legal process, or the ability to work appropriately with counsel in the context of a central nervous system disorder that involves dementia, probably secondary to epilepsy; and that he is not competent to stand trial, and that the deficits that are germane to this conclusion are not related to malingering."[14]

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[13] Dr. Pickar also spoke with appellant's family, interviewed doctors that treated appellant at St. Elizabeths, and reviewed appellant's medical records.

[14] The court also had before it the opinions of doctors who had performed the criminal responsibility examination during the spring of 2003 and doctors who had examined appellant during the time that he was evaluated at St. Elizabeths Hospital for the purpose of determining whether he was competent to stand

The government's experts did not dispute that appellant had some degree of cognitive impairment. Dr. Raymond Patterson,[15] a forensic psychiatrist who

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trial in his misdemeanor cases. On May 5, 2003, Dr. Sidney Binks, a neuropsychologist, reported that appellant's test scores "suggested significantly impaired cognitive functioning comparable to those of a group of elderly individuals with dementia" and concluded that appellant "did not malinger." On January 2, 2002, psychologist Dr. Anita Boss stated that appellant was "unable to participate in court proceedings at this time" and that "it is unclear if his condition will significantly improve and a minimum of 30 to 45 days is recommended before re-evaluation." On January 30, 2002, Dr. Michele Piquet stated that appellant was "not competent to stand trial because cognitive factors substantially impair his capacity to have a factual and rational understanding of the proceedings against him, and to properly assist counsel with preparation of his defense." In a letter dated March 27, 2002, the Forensic Inpatient Services Division ("FISD") of the District of Columbia Department of Mental Health reported that it was "too early in treatment program to determine the likelihood of Mr. Wallace attaining competency in the foreseeable future." On May 24, 2002, FISD reported that it was "unlikely that Mr. Wallace will attain competency in the foreseeable future." On June 26, 2002, psychologist Dr. Mitchell Hugonnet stated that appellant's "judgment was severely impaired," that he was diagnosed with dementia due to diabetes and epilepsy, and that he was "unable to manage the basic concepts associated with competency to stand trial."

[15] Dr. Patterson examined appellant only once. He also spoke with two of appellant's treating physicians and several individuals that supervised appellant at both the mental hospital and the jail, and reviewed "quite a lot of records" from "every expert [that] has testified...." In addition, he observed that "being here in the courtroom and hearing [appellant's] capacity to render information when he chooses to [was] also quite helpful" to him in evaluating appellant's competence.

had completed several hundred competency examinations, testified that he "had no conflict" with tests showing that appellant had some degree of neurological damage and acknowledged that "there might be some mild dementia," but stated that this "does not mean that [appellant] does not have the ability ... to exaggerate as much as he might think he should to convince people that he doesn't know what's going on." Dr. Patterson opined that appellant "certainly was malingering" and "certainly was ... exaggerating symptoms ... when they said he had an IQ of 55, because I simply don't believe he has an IQ of 55." Dr. Patterson cited specific examples of appellant's malingering: "choosing how [he] respond[s] based on who [he's] talking to"; appellant's "ridiculous" response to a question about the colors of the American flag, a question that even mentally retarded individuals and people with serious mental illness "don't miss"; appellant's claim to hear voices but his ability to concentrate and his lack of distraction, which are inconsistent with that affliction; and his exhibiting "high-level" planned behavior, such as injecting himself with insulin to get medical attention in the emergency room faster than other people.

Dr. Patterson further testified that appellant's behaviors inconsistent with an IQ level of 55 included acting as a "predator" while at St. Elizabeths but not while in jail, where appellant appeared to be "normal," like "any other inmate who is not receiving mental health services." Dr. Patterson agreed with a statement in a discharge summary, attributed to Dr. William Richie, one of

appellant's treating psychiatrists at St. Elizabeths, that appellant was "capable of dissimulating, fabricating, prevaricating and malingering cognitive disabilities in excess of his documented deficits." Noting that the issue was "whether or not [appellant] understands, rationally and factually these proceedings, the charges against him, the consequences; and can he, does he have the ability to assist his attorney," Dr. Patterson stated that "In my view, he has both of those." Dr. Patterson thought that appellant's case was "not a close call at all," explaining that "when [appellant] adheres to his treatment regime, seems to do pretty well. When he doesn't, he runs into problems. The latter, in my view, are very much and directly related to his attempts to not have this matter go forward, and in part because he has been in a position where precisely that has happened before."

Dr. Steven Lally, a clinical and forensic psychologist who had previously conducted between 200 and 250 competency evaluations,[16] spent 7 1/2 to 8 hours with appellant at the D .C. Jail on October 24, 2003. Dr. Lally administered a neuropsychological screening test that showed that appellant was "performing in the moderate to severely impaired range." Dr. Lally also administered a test for memory malingering that "did not disclose malingering." Dr. Lally explained that the tests showed that appellant was "answering

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[16] Dr. Lally also spoke with Dr. Hugonnet of St. Elizabeths and with appellant's long-time girlfriend, and reviewed records from a number of sources.

in a ... sort of careless random fashion," the reason for which the test cannot explain. Dr. Lally concluded that one "should not put a lot of credibility [sic] in terms of [appellant's] performance in psychological tests." With respect to one of the tests, Dr. Lally also explained that "if [the] test does not indicate malingering, it does not mean that the individual is not malingering. In other words, it's a test that's very effective when it does indicate malingering. But studies have shown that a number of malingerers ... don't necessarily get caught with the [test]."

On the basis of an interview with appellant, Dr. Lally concluded that appellant's behavior was inconsistent with the degree of impairment that appellant claimed, but was consistent with malingering. Dr. Lally noted that when he would stop taking notes during a meeting with appellant, appellant's speech became more spontaneous and his answers more accurate. Further, appellant mixed symptoms of various disorders and failed to remember details of the crime unless the detail was exculpatory. Dr. Lally testified that although appellant reported "hearing voices," his symptoms were inconsistent with that condition. The symptoms that appellant reported were also inconsistent from one doctor's visit to the next, which Dr. Lally explained was a sign of malingering because malingerers "don't always know how to respond." Dr. Lally concluded that appellant was malingering "both psychotic symptoms and also some degree of cognitive impairment."

Dr. Oliver testified that he found "inexplicable inconsistencies" between the November 2002 and September 2003 interviews he conducted with appellant.[17] During both interviews, appellant exhibited a good memory, was able to recite telephone and social security numbers, and could give background details. During the September 2003 interview, however, in contrast with the November 2002 interview, appellant had no knowledge about the charges and legal issues discussed. Unable to explain the differences in appellant's behavior, Dr. Oliver concluded that appellant was intentionally producing symptoms.

b. The Trial Court's Competency Ruling

Upon this evidence the trial court found that there was "no doubt that Mr. Wallace suffers some cognitive deficits," but that it was "evident from the record" that these impairments do not "preclude him from the rational understanding of the charges and proceedings against him," "nor do they preclude him from consulting with his lawyers." The court concluded that appellant is "malingering and remains competent to stand trial in this case."

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[17] Dr. Oliver had performed "somewhere around 4000" competency evaluations, and had found in more than half the cases that the person evaluated was incompetent. By contrast, Dr. Hyde testified that he had previously been retained on only five or six occasions to examine the issue of competency, always by the defense, and had testified on competency on two or three occasions.

Appellant accuses the trial court of "look[ing] past the mountain of scientific evidence showing the [appellant's] incompetence" and "seiz[ing] upon a red herring: the prosecution's charges of 'malingering'...." We are satisfied, however, that the trial judge did not ignore or overlook appellant's evidence of impairment.

First, acknowledging the conflicting evidence, the court told the parties that "this is a difficult case." Second, explaining its finding that appellant was malingering, the trial court specifically relied on the testimony that, on one of the tests for malingering, appellant gave "careless responses which invalidated the test results," and that even when an individual "passes" a malingering test "it does not mean you do not have malingering. It just means they didn't choose to do it in a way that is detected in [the] test." Appellant emphasizes the evidence that he "passed" two tests designed to detect malingering and asserts that the court's finding that he was malingering cannot be squared with the evidence, but the trial judge's explanation identified evidence that, we agree, supports her conclusion.

Third, the trial court's finding that appellant was competent to stand trial is not plainly contrary to the neurological evidence of appellant's impairment. The defense and prosecution experts agreed that cognitive impairment does not necessarily mean incompetence: Dr. Hyde acknowledged that an individual with organic brain damage can be competent, and Dr. Patterson testified that cognitive impairment and brain damage do not necessarily

render someone incompetent to stand trial and that a person's having dementia does not mean that he is incompetent. Further, there was no consensus, even among defense experts, that appellant suffered from psychosis or any other mental illness.[18]

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[18] Appellant exhibited "psychotic symptomatology" during Dr. Hyde's visit with him during October 2003, but Dr. Hyde had "not formed a final opinion about" whether appellant had a mental illness. Dr. Pickar believed that appellant experienced auditory hallucinations, but was uncertain as to whether appellant was suffering from psychosis. Dr. Oliver opined that appellant was not mentally ill.

We note that in a December 16, 2003 report, the District of Columbia Commission on Mental Health referred to appellant's "mental illness" but appears to have utilized that term synonymously with the term "dementia." At one point in its report, prepared after the Commission heard testimony from St. Elizabeths staff psychiatrist Dr. William Richie, the Commission stated that appellant "has difficulty attending to daily needs without supervision due to his [mild to moderate] dementia." At another point in its report, the Commission summarized Dr. Richie's views that "one factor that would cause [appellant] to injury [sic] himself or others is his mental illness," which "impairs his ability to care for himself, including his medical care. The cognitive deficits caused by dementia will more likely cause respondent to engage in activities that will injure others." Elsewhere, dementia has been distinguished from mental illness. *See, e.g.*, 70 Fed. Reg. 4194, 4216 (2005) (Department of Health and Human Services Medicare program rulemaking notice distinguishing "mental illness" from "cognitive impairments such as Alzheimer's disease or other dementias"); 62 Fed. Reg. 67174, 67201 (1997) (Department of Health and Human Services rulemaking notice stating that "a person with a primary diagnosis of dementia would not be considered to have mental illness").

Appellant suggests that the trial court should have given more weight to the competency determinations by doctors who saw appellant over the course of his several-month-long inpatient stays at St. Elizabeths than to the views of the doctors who saw appellant on fewer, more abbreviated occasions. However, in exercising her discretion, the trial judge was entitled to credit the view of the government's experts that those doctors simply "got it wrong."[19] *Cf.*

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[19] It is clear from the record that the trial judge considered whether to give special weight to the views of St. Elizabeths doctors who saw appellant regularly while he was housed there. During the competency hearing, the following exchange took place between the court and Dr. Patterson:

The Court: In reviewing what records I have been able to see, there's a big hole here in the background. I've got a year where [appellant] is at the hospital where their-a sophisticated staff is working with him, and they are concluding that not only is he incompetent, but he's not likely to regain competence.

The Witness: Yes.

The Court: And then bingo, he comes in, in October, like one day after he's released under that finding, and he's suddenly competent.

The Witness: Yes.

The Court: How do you evaluate that?

The Witness: I think, frankly, that they got it wrong; that the presentation for Mr. Wallace and the blurring of the lines and that's, in part, what makes it difficult, because Mr. Wallace does have diabetes, and Mr. Wallace does, it appears, to have had a seizure disorder for some time.

So you take those, and if you are not real careful, you can make a jump, a leap, in my view, that he's got such significant brain damage or impairment that he's not competent, and won't be competent. I frankly don't understand it.

I think it was a mistake. And I think that that mistake is borne out by his level of functioning that's seen not just in October and November, but also seen when he's interviewed by some of

United States v. Chischilly, 30 F.3d 1144, 1150 (9th Cir. 1994) ("[t]o the extent that [the trial judge], from his courtroom observations, assigned more weight to the Government's expert than to the contrary, ... he was acting within his discretion to do so as a part of his fact-finding and credibility-weighing functions."). In some instances, this court accords greater weight to the opinions and diagnoses of a treating physician than to the opinions of non-treating physicians who have been engaged to provide medical evaluations. *See, e.g., Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 926 A.2d 140, 146 (D.C. 2007) (noting that the law affords the diagnosis of a treating physician more weight than the conflicting opinion of a non-treating physician in a worker's compensation determination); *Kralick v. District of Columbia Dep't of Employment Servs.*, 842 A.2d 705, 711 (D.C. 2004) (same, citing case authority). However, with respect to competency determinations in criminal cases, neither this court nor others have required deference to treating physicians or to doctors who saw a defendant on multiple occasions as an inpatient.[20]

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the experts in this matter, and the information that he provides.

[20] As the United States Court of Appeals for the Fourth Circuit has explained:

[A] district judge's discretion in these matters properly includes the power to discount [the testimony of the defendant's personal physician]. He might find a treating physician's testimony unpersuasive because he lacks confidence in the physician's qualifications or abilities. The trial judge must also weigh, implicitly or explicitly, a treating physician's candor and

Moreover, even if the trial court had given special weight to the views of appellant's treating physicians, no different result would have been required. None of the experts who testified at the competency hearing were appellant's "treating physicians." But Dr. William Richie was one of appellant's treating psychiatrists at St. Elizabeths, and the St. Elizabeths discharge summary discussed at the competency hearing attributed to Dr. Richie the statement that appellant "has [a] selective memory and is capable of dissimulating, fabricating, prevaricating and malingering cognitive disabilities in excess of his documented deficits."[21] And although other doctors who saw appellant on an inpatient basis at St. Elizabeths in 2002 and 2003 opined that he was unable to participate in court proceedings or to assist counsel with his defense, see *supra* note 14, experts appear to agree that an individual who is mentally incompetent to stand trial at one point in time may be competent to stand trial at a later time. For example, while Dr. Boss found appellant incompetent to participate in court proceedings in January 2002, she also commented that it "may be

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objectivity.... [R]ules developed by appellate courts in limiting the discretion of administrative law judges and administrative agencies-rules motivated in part by concerns about agency independence and bias-have little or no relevance to the exercise of discretion by a district court.
United States v. Brown, 821 F.2d 986, 990 (4th Cir. 1987) (internal citation omitted).

[21] In addition, Dr. Lally drew his conclusion that appellant was malingering, in part, from his conversations with Dr. Richie.

useful for Mr. Wallace if defense counsel can spend even more time with him to go over the details of his cases and legal strategy. Multiple repetitions, in addition to frequent discussion, may help [him] recall what he needs to know in order to better inform his choices and ability to participate." *See also Carmichael,* 479 A.2d at 327 (noting that a doctor at St. Elizabeths had confirmed that Carmichael was incompetent to stand trial, "but three months later this same doctor reported that the subject's mental condition had improved enough so that he was fit to stand trial"). Notably, the record indicates that appellant did receive "competency training" while at St. Elizabeths. All of this is to say that even if the court had been required to accord special significance to the views of the St. Elizabeths doctors that appellant was incompetent to stand trial at the time the doctors expressed those views, deference to those doctors' views did not require the court to find that appellant was incompetent to stand trial in November 2003 or to enter a plea in January 2004.

The trial court weighed the evidence and found that "while ... there is dementia and impairment," the "evidence of malingering is far more powerful than the evidence of significant progressive deterioration." In essence, appellant's disagreement is with the weight the trial judge accorded to the conflicting expert opinions about competency.

To disturb the trial court's findings, however, this court would have to re-weigh the evidence. That we may not do.

Our case law is clear that when there is a plausible explanation presented by two competing groups of experts, the decision is one for the fact finder. *See Jackson v. Condor Mgmt. Group, Inc.*, 587 A.2d 222, 225 (D.C. 1991) ("When a case turns on controverted facts and the credibility of witnesses, as this one does, it is peculiarly one for the [finder of fact]. The fact that some of the witnesses may be experts does not alter this rule." (internal citation omitted)). This principle applies with respect to expert medical testimony just as it does to other expert evidence. *See Washington Metro. Area Transit Auth. v. District of Columbia Dep't of Employment Servs.*, 770 A.2d 965, 970 (D.C. 2001) ("In evaluating conflicting medical testimony, as in weighing evidence generally, the hearing examiner has wide latitude. The examiner is entitled to draw reasonable inferences from the evidence presented, and her decisions are especially weighty when they involve credibility determinations."(internal quotation marks and citation omitted)). And it applies with respect to competency hearings just as it does to other proceedings. *See, e.g., Ray v. Duckworth,* 881 F.2d 512, 516 (7th Cir. 1989) (holding that "[b]ecause of the potential for divergent and often conflicting opinions on the issue of the defendant's competency, we must be careful to give due regard to the trial court's superior ability to draw the appropriate inferences from its observation of the defendant and expert witnesses, as well as the examination reports before it," and noting that the trial court was making a "credibility determination"

when it chose to believe the expert opining that appellant was malingering).

In this case, the trial court was presented with "two permissible views of the evidence as to competency...." *Villegas,* 899 F.2d at 1341. "[T]he court's choice between them cannot be deemed clearly erroneous." *Id.; see also Izquierdo,* 448 F.3d at 1278 (same). We can find no clear error in the court's November 2003 determination that appellant was competent to stand trial. Accordingly, appellant has not met the "substantial" burden he must meet to show that withdrawal of his plea was necessary to correct a manifest injustice. *Williams v. United States,* 595 A.2d 1003, 1006 (D.C. 1991); *see also Higgenbottom,* 923 A.2d at 897 ("We review a court's competency determination ... for abuse of discretion, the exercise of which we will not lightly disturb."(internal quotation marks and citation omitted)).

c. The Court's Denial of the Motion to Withdraw in the Face of Post-Competency Hearing Evidence

Just before the plea proceedings commenced on January 5, 2004, the court was advised that appellant had been hospitalized for twelve days during December 2003. The court inquired of defense counsel whether he had "seen any significant difference in [appellant's] functioning since this latest episode in the hospital." Although defense

counsel responded that he had not,[22] the information about appellant's post-competency-hearing hospitalization arguably raised anew the issue of appellant's competency. This court has held that "where the issue of a defendant's mental competence [has] been raised on the record, the trial court must conduct a specialized hearing to determine the competence of a defendant who seeks to plead guilty." *Edwards,* 766 A.2d at 988 (quoting *Hunter v. United States,* 548 A.2d 806 (D.C. 1988)). The trial judge did not conduct a second competency hearing, and so we must address the issue of how this bears on appellant's motion to withdraw his guilty plea. The issue is an important one because the record reveals that appellant suffered a major seizure on December 18, 2003, and while hospitalized underwent an EEG that showed what Dr. Hyde, in a letter dated January 8, 2004, called "markedly abnormal brain activity."[23] And, in her November 10,

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[22] Specifically, defense counsel responded, "No, Your Honor. My only visit with him after this episode was last night. As the Court knows, my view is that there are significant problems here. I can't say that I think they're more significant now that they have been. I'm not an expert on those things."

Similarly, during the proceedings on January 15, 2004, appellant's counsel informed the court that there was "no change in [appellant's] condition since we were here on the competency decision." The trial court referred to this information in denying the motion to withdraw.

[23] Dr. Hyde's January 8, 2004 letter, which was initially presented to the court to support appellant's sentencing recommendation, was resubmitted as an exhibit to the motion to withdraw the guilty plea. In the letter, Dr. Hyde noted that

2003 competency ruling, the trial judge had specifically noted Dr. Hyde's testimony that "seizures can result in loss of consciousness and confusion in post seizure, as well as an impairment of cognitive function."

We addressed a similar situation in *Edwards,* where the court conducted a plea proceeding and accepted Edwards' guilty plea while "unaware of his diminished mental capacity," which was later documented in an evaluation by a clinical psychologist, Dr. Levin. Dr. Levin's evaluation described the substantial brain damage and marked changes in cognitive functioning that Edwards had sustained after a beating by police years earlier. *See* 766 A.2d at 984, 987. We noted that even though the trial court had been unaware of this history during the plea proceeding, the trial judge's denial of Edwards' post-sentencing motion to withdraw his plea "was informed by Dr. Levin's evaluation." *Id.* at 988.We rejected Edwards' claim that the court had erred in denying his motion to withdraw, noting that the denial was "based primarily on [the trial judge's] personal observations of and conversations with Edwards, factors to which we accord great

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appellant "was emergently transported from jail to Greater Southeast Community Hospital on December 18, 2003. He was admitted with diabetic ketoacidosis, a severe metabolic condition produced by out of control diabetes. In addition, he suffered a major seizure in the emergency room (due in part to a subtherapeutic blood level of Dilantin, his anticonvulsant medication). He was admitted to the hospital, where he remained for twelve days while his multiple metabolic problems were corrected."

deference." *Id.* We also noted that Dr. Levin "never opined that Edwards was incompetent to enter a plea," *id.,* and that the trial judge had clearly considered Dr. Levin's report but rejected it as "unpersuasive on the issue of Edwards' competence at the time of the plea." *Id.* at 988 n.10.

We reason similarly here. It appears that Judge Broderick was not aware of the details of appellant's December 2003 hospitalization and EEG at the time of the plea proceeding, but information about both did inform her denial of Wallace's motion to withdraw his guilty plea. Judge Broderick noted that appellant's EEG taken on December 24, 2003 "evidenced permanent and irreversible brain damage," that appellant had "a major seizure on December 18, 2003, eighteen days before his plea hearing," and that Dr. Hyde "found that [appellant] became confused for several days after 'a bout of severe seizures.'" However, like the trial judge in *Edwards,* Judge Broderick found the evidence relating to the December 2003 episode unpersuasive on the issue of competence, stating that "[n]o evidence was presented that there was a change in the Defendant's [competency] since the time of the competency findings." We find no clear error in the court's assessment. Even if we discount the lay opinions of defense counsel that there was no change in Wallace's functioning between the time of the competency hearing in November 2003 and January 2004, the record does not compel a conclusion that appellant's competency had diminished from November 2003 to January 2004.

As noted, Dr. Hyde's letter of January 8, 2004, interpreting appellant's December 24, 2003 EEG stated that the EEG showed "markedly abnormal brain wave activity, with slowing over the frontal lobes," consistent with "permanent and irreversible frontal lobe damage." But Dr. Hyde did not suggest in his letter that the new EEG showed that appellant was incompetent at the time of his plea.[24] Indeed, Dr. Hyde had earlier testified that an abnormal EEG does not mean that an individual is incompetent to stand trial, agreed that an EEG "look[ed] at ... in isolation" does not tell much about competency, and explained that "it is possible [for an individual] to have both normal and abnormal studies." Also of particular note, Dr. Hyde had explained during the competency hearing that "you will see a lot of abnormalities in the post-seizure period." Taken together, Dr. Hyde's statements suggest that it was to be expected that appellant's EEG taken six days after his December 2003 seizure would show abnormal brain activity, and that no conclusion can be drawn from that EEG that appellant was less competent to enter a plea on January 5, 2004 (seventeen days post-seizure) than he had been at the time of the competency hearing.

Moreover, the December 2003 EEG appears to be cumulative of evidence already on the record. In his January 8, 2004 letter, Dr. Hyde referred to the 2003 EEG as providing "*additional evidence* of abnormal

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[24] Rather, Dr. Hyde's letter outlined appellant's need for medical supervision while in custody and suggested that appellant's brain damage qualified as "statutory mitigation in the sentencing proceedings."

slowing over the frontal lobes" (emphasis added). This had already been shown "by other abnormalities on neurological examination reflecting his underlying brain damage," including "clumsy fine motor movements with the left hand, bilaterial grasp reflexes, and poor complex motor sequencing in the hands bilaterally ."Dr. Hyde testified about these same abnormalities at the competency hearing, stating that in April 2003, appellant had "clumsiness on a number of fine motor movements," and "primitive reflexes," often seen in individuals with frontal lobe dysfunction," and noting that "there ha[d] been some progressive brain damage" since appellant's 2000 EEG (which had also shown "bilateral slowing over the cerebella hemispheres").[25] *Cf. Williams,* 595 A.2d at 1005 & n.2 (psychological report introduced at post-plea hearing had no bearing on defendant's competency because it added nothing to what was already known at the time of the plea).

Dr. Hyde's January 8, 2004 letter discussed not only appellant's December 24, 2003 EEG, but also the facts that appellant's "mental status fluctuates in response to his seizure disorder" and that appellant "often is confused for several days after a bout of

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[25] With this motion to withdraw, appellant also presented a letter from St. Elizabeths neuropsychologist Dr. Sidney Binks, who stated that appellant suffers from dementia and severely diminished ability to act within the confines of the law;" and a letter from Dr. William Richie, who treated appellant during December 2003 and who also stated that appellant showed symptoms of dementia. This evidence, too, was cumulative.

severe seizures." It is not clear from the record whether appellant's December 18, 2003 seizure was part of a "bout of severe seizures," or whether, if appellant was confused after the December 18 seizure, that confusion (perhaps "several days" of confusion) had resolved or subsided by the end of his twelve-day hospital stay. However, in denying appellant's motion to withdraw, the trial judge emphasized that "[a]ll the evidence was considered," and one piece of important additional record evidence was an evaluation by Dr. Lally, setting out his findings from a 2.75-hour interview of appellant that Dr. Lally conducted at D.C. Jail on December 31, 2003, *i.e.,* after appellant had been discharged from Greater Southeast Community Hospital.[26] During this visit with appellant, Dr. Lally observed that appellant was "alert" and "oriented to person, place, and time" and that appellant's speech was clear and at a normal volume." Although appellant's "speech tended to be slower with lengthy delays in his response to questions" about court-related matters, there was "no evidence of a thought disorder in the form or content of his thinking." Appellant's "expression of affect was somewhat constricted, but generally appropriate." In short, this evaluation by Dr. Lally-the only expert evaluation in the record that is based on an interview of appellant after his December 2003 seizure but before his January 5, 2004 guilty plea-contained nothing that required the

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[26] Dr. Lally's evaluation was submitted to the court under cover of the government's January 5, 2004 "Notice of Expert Report Issued by Government's Expert."

trial judge to conclude that appellant's competence to stand trial or plead guilty had diminished between the November 2003 competency hearing and the January 2004 plea proceedings.

We reach the same conclusion about the other new evidence that appellant presented with his Rule 32(e) motion. Appellant contends that his Bureau of Prison medical records generated since his guilty plea-one dated October 22, 2004, and the other dated January 7, 2005,-confirm that he is incompetent and not malingering.[27] The trial judge refused to consider these records, reasoning that they were not relevant to appellant's competency during the plea. The trial court applied the appropriate standard. As the Supreme Court instructed in *Dusky,* it is a defendant's "present ability" that should be evaluated during competency evaluations. 362 U.S. at 402. The trial judge did not abuse her discretion in holding that appellant's mental evaluations on dates nine and twelve months after the guilty plea have little if any relevance on the issue of whether appellant was competent when he entered his guilty plea. *Cf. United States v. Collins,* 430 F.3d 1260, 1267 (10th Cir. 2005) (noting that a defendant's competency can change over time) and *Rogers v. Snyder,* No. 00-007, 2001 U.S. Dist. LEXIS 8866, *16-17 (D. Del. 2001) (disallowing new evidence suggesting that petitioner was not competent to

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[27] These medical records indicate that appellant has "cognitive deficiencies," "adult antisocial behavior," "Chronic dementia," and "episodic delirium," and state that there was no evidence of "intentional suppression of his performance (malingering)."

stand trial in March 1996 as it was not relevant to whether petitioner was competent to enter a guilty plea in 1993).

Finally, as we did in Edwards, we accord great deference to Judge Broderick's personal observations of and conversations with appellant, which informed her judgment that appellant was competent to plead guilty on January 5, 2004. The trial judge noted in her order denying the motion to withdraw that she "carefully assessed the Defendant at every question" during the plea proceeding and that "the Defendant's mental state was understood and considered by the Court at the time of the plea."

For all the foregoing reasons, we cannot conclude that the trial court abused its discretion in denying the Rule 32(e) motion to withdraw on the grounds of appellant's (claimed) mental incompetency to enter a plea.

B. The Rule 11 Proceeding

The Rule 11 plea proceeding in this case was conducted on January 5, 2004. During a plea proceeding, the court must make inquiry and satisfy itself that "the defendant actually does understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Godinez,* 509 U.S. at 401 n. 12 (emphasis omitted). Appellant focuses on a number of exchanges that he argues evidence his "confusion" during the plea proceeding:

THE COURT: [Following an explanation of the insanity defense] All right. Now, do you intend to use

that defense, insanity defense?
DEFENDANT: Yes.
THE COURT: Okay. If you go to trial, you're going to use that?
DEFENDANT: Yes.
THE COURT: Do you want to go to trial and use that defense?
DEFENDANT: Do I want to go to trial?
THE COURT: Yes.
DEFENDANT: I believe, yes. I believe so.

* * * *

THE COURT: Okay. Now, you've indicated today that you would like to enter a plea of guilty; is that correct?
DEFENDANT: Yes.
THE COURT: Now, if you enter a plea of guilty, Mr. Wallace, do you understand that you would not actually go to trial?
DEFENDANT: I understand.
THE COURT: All right. And do you understand that you'd actually be admitting that you did, in fact, commit a murder?
DEFENDANT: Yes.
THE COURT: Okay. So, therefore, there wouldn't be any defense at that time?
DEFENDANT: Right.
THE COURT: So if you did that, if you entered a plea of guilty, then you wouldn't be using the insanity defense. Do you understand that?
DEFENDANT: Right.
THE COURT: Do you want to use the insanity defense?

that defense, insanity defense?
DEFENDANT: Yes.
THE COURT: Okay. If you go to trial, you're going to use that?
DEFENDANT: Yes.
THE COURT: Do you want to go to trial and use that defense?
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* * * *

THE COURT: Okay. Now, you've indicated today that you would like to enter a plea of guilty; is that correct?
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DEFENDANT: Right.
THE COURT: So if you did that, if you entered a plea of guilty, then you wouldn't be using the insanity defense. Do you understand that?
DEFENDANT: Right.
THE COURT: Do you want to use the insanity defense?

DEFENDANT: Yes.
THE COURT: All right. Well, do you want to go to trial, then, or do you want to plead guilty?
DEFENDANT: Well, I would like to go to trial.
THE COURT: You would like to go to trial? All right. So you don't want to plead guilty to second-degree murder today?
DEFENDANT: No.
THE COURT: You want to have a trial with a jury?
DEFENDANT: Yes.
THE COURT: And have them decide?
DEFENDANT: Yes.

After a four-minute recess, defense counsel reported that appellant "again indicated he would like to take the Government's plea offer. The following exchange ensued:

THE COURT: All right. Mr. Wallace here. All parties who were previously present are present again.
Mr. Handzo?
MR. HANDZO: Your Honor, we explained to Mr. Wallace again that he has the choice of taking the government's plea offer to Murder II or going to trial on Murder I and that if he accepts the Government's plea offer of Murder II, there will be no trial and no insanity defense or alternatively he could reject that and go to trial on the more serious offense of Murder I. He has again indicated that he would like to take the Government's plea offer.
THE COURT: Okay. All right. Let's proceed, then.
So, Mr. Wallace, you want to take the Government's plea offer; is that correct?
DEFENDANT: That's correct.

DEFENDANT: Yes.
THE COURT: All right. Well, do you want to go to trial, then, or do you want to plead guilty?
DEFENDANT: Well, I would like to go to trial.
THE COURT: You would like to go to trial? All right. So you don't want to plead guilty to second-degree murder today?
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THE COURT: Okay. All right. Let's proceed, then.
So, Mr. Wallace, you want to take the Government's plea offer; is that correct?
DEFENDANT: That's correct.

THE COURT: So that means you don't want to go and use the insanity defense; is that correct?
DEFENDANT: No.
THE COURT: No, you don't want to use it or, no, that's not correct?
DEFENDANT: No, I don't want to use it.
THE COURT: Okay. Do you understand that if you did go to trial, this is just if it did happen that you went to trial, okay, and you used the insanity defense, do you understand the Government would still have to prove first beyond a reasonable doubt that you committed the crimes that you've been charged with?
DEFENDANT: Yes.
THE COURT: And do you understand that even if you raise it, you could also raise other defenses, for example, self-defense.
DEFENDANT: Yes.
THE COURT: Do you understand that if you went to trial and used the insanity defense that that would only be considered if the jury found first you were guilty beyond a reasonable doubt?
DEFENDANT: Yes.

* * * *

(Pause)
THE COURT: Now, after all we've talked about, do you still not want to raise the insanity defense, but instead wish to plead guilty?
DEFENDANT: Yes, that's correct.
THE COURT: All right. Why don't you tell me why you want to do that.
DEFENDANT: I guess just being able to see actually

evidence that was supposedly used in this particular case.
THE COURT: So you're saying the evidence has convinced you that it's in your best interest to plead guilty?
DEFENDANT: I don't-don't say it that way. I haven't seen any evidence myself.
THE COURT: I'm sorry then. I'm just trying to understand your answer. Why do you want to plead guilty in this case?
DEFENDANT: It's just-been in courts for quite a while now, and I just like to-for anyone to actually show any evidence proving that I am guilty to just show that evidence.
THE COURT: Okay. Now, do you understand that if you plead guilty, the Government is going to tell you what they would have proven, but they're not going to be bringing in witnesses and things to testify.
Do you understand that?
DEFENDANT: Correct.

After the government's proffer of what the evidence would show, the court asked appellant to state what happened on the day in question. The following exchange occurred: THE COURT: So what you're telling me, Mr. Wallace, is you were defending yourself? You're telling me you didn't commit a murder, you defended yourself? Is that what you're telling me?

DEFENDANT: I know I used a knife in this particular case.
THE COURT: Did you stab him in the neck?
DEFENDANT: It was in his neck.

THE COURT: And was it a sharp knife?
DEFENDANT: It was a butter knife.
THE COURT: Was it a sharp butter knife?
DEFENDANT: No.
THE COURT: Well, then how did it stab his neck?
DEFENDANT: That's what I wanted to know also, and I was-while using the vehicle-
THE COURT: Why did you feel you had to use a knife, Mr. Wallace?
DEFENDANT: You say why?
THE COURT: Yes. Why didn't you just punch him back?
DEFENDANT: Well, I was on the ground myself, and I know I was suffering from low blood sugars myself. I was real just-just wanted to eat the-my hamburgers that I had.
THE COURT: Well, this is more than 15 minutes after you saw him the first time and you still hadn't eaten your hamburgers?
DEFENDANT: I didn't get them all. I was just chewing on them. I didn't actually finish them.
THE COURT: Mr. Wallace, are you telling me that this was self-defense? Are you telling me that?
DEFENDANT: The knife was used in this case.
THE COURT: Are you telling me you used more force than you had to use by using the knife.
DEFENDANT: I guess that didn't have to be used. I don't think-no, I'm not saying that.
THE COURT: You're not saying what?
DEFENDANT: It could have been done, I guess, getting right back up and catching the guy and punching him back, I guess.
THE COURT: All right. So you used more force than

you had to use? Is that what you're saying?
DEFENDANT: I guess so....
THE COURT: Are you pleading guilty in this case because you did, in fact, stab this gentleman with t[o]o much force?
DEFENDANT: I don't think too much force was used.
THE COURT: Let's go back. You said you didn't have to do the stabbing, right?
DEFENDANT: I didn't have to use it.
THE COURT: Right, that's what I mean. Did you do that? Did you stab him when you didn't have to?
DEFENDANT: I guess so.
THE COURT: You guess so or are you sure?
DEFENDANT: Yes. Yes.
THE COURT: Are you sure about that?
DEFENDANT: Yes.
THE COURT: Is that why you pleaded guilty?
DEFENDANT: Yes.

Finally, appellant focuses on the following portions of the transcript from the January 15, 2004 *Frendak* hearing:

THE COURT: When you were here last time, Mr. Wallace, we talked about whether or not you would give up your right to an insanity defense. Do you know what I mean by that?
DEFENDANT: Yes.
THE COURT: Do you still want to do that?
DEFENDANT: No.
THE COURT: You don't want to give up your right?
DEFENDANT: No.
...

THE COURT: ... Let me ask the question in a different way okay, Mr. Wallace?
DEFENDANT: Okay.
THE COURT: What I mean by an insanity defense is that you would go to trial and you would try to convince the jury that you didn't-you are not guilty of this crime because you were insane at the time. Do you want to go to trial and try to convince the jury that you were insane at the time?
DEFENDANT: No.

To summarize, in the exchanges that appellant now highlights, appellant told the trial court that he wanted both to plead guilty and to pursue an insanity defense, both to plead guilty and to have a jury trial, and both to enter a guilty plea and to put the government to its proof.[28] He both pled guilty and appeared to assert a claim of self-defense and lack of excessive force. Although he eventually stated affirmatively that he stabbed McCants when he did not need to do so, this answer was preceded by the equivocal response that he "guess[ed]" he had done so. In addition, his answers to some of the court's questions were non-sequiturs.[29] In short, appellant

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[28] *Cf. Gooding v. United States*, 529 A.2d 301, 311 (D.C. 1987) (concluding that pre-sentencing withdrawal of appellant's guilty plea should have been permitted, in part because "the inherent ambiguity in appellant's responses at the time the guilty plea was entered implies the possibility of some confusion").

[29] Appellant also quotes the following portion of the January 15, 2004 transcript as evidence of his "utter lack of understanding" of the plea proceedings:
THE COURT: Do you want to have the [DNA] testing done or give up your right to have the testing done?

contends, the portions of the plea colloquy that he highlights belie the trial judge's findings that "defendant understands his rights and ... understands the proceedings and is competent to proceed."

In reviewing a guilty plea, however, we must "examine[ ] the entire plea record and analyze[ ] the totality of the circumstances surrounding the plea." *Edwards,* 766 A.2d at 987. Here, the entire plea record and the surrounding circumstances leave no room for doubt that "the trial court engaged in a careful, probing, patient, and extensive colloquy" with appellant.[30] *Id.* at 988. The issue is whether the

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DEFENDANT: Yes, I want the testing done.
THE COURT: You want the testing done. What do you want to have tested?
DEFENDANT: Well, not just the compact discs. Is that, is all I see here.
The foregoing exchange is further evidence of appellant's having gone back and forth about whether to plead guilty or instead to put the government to its proof, but, taken in context, the exchange is not as incoherent as it may appear to be in isolation. The reference to "compact discs" appears to be a reference to the compact discs that were found in McCants' car, from which latent fingerprints were lifted. Thus, they were among the physical evidence in the case that was available for DNA testing.

[30] The judge noted at the outset that she was "going to be asking [appellant] a lot of questions ...." and that everyone should sit "because this might take a while." At the beginning of the proceedings, she also invited appellant to "talk to your lawyers at any time, and she repeatedly insisted that appellant talk to his attorneys when she sensed that he might be confused. Before the Rule 11 colloquy and twice during the *Frendak* inquiry, the judge reminded appellant he could speak with his

lawyers, and she called breaks so that appellant could do so. Several times, the trial judge stated that she would not rush the Rule 11 proceeding, explaining at one point that she was "willing to take as much time as we need...."

Further, the trial judge asked appellant whether he understood the charges against him, and required him to explain the charges to her when he said that he did. She verified that he was familiar with the insanity defense and asked him to explain that to her as well. She also verified that appellant had talked with his doctors about his insanity defense possibilities.

After appellant told the court that he wanted both to plead guilty and to proceed to trial where he would use the insanity defense, the trial judge recessed so that appellant could speak with his attorneys. Although appellant derides the recess as a "court-ordered break for a coaching session," we see no basis for that characterization. Immediately before the break, when appellant expressed his desire to go to trial, the judge ended her comments by asking defense counsel "[d]o you want a couple of minutes to talk to [appellant] and just make sure that I've gotten everything right?" The judge made clear that she had no pre-disposed view as to what should be the outcome of the hearing. She said that she was willing to take the time "to resolve it in either direction," telling the defense team that "whatever way you want to go, we'll go." In addition, before the proceedings began, the judge warned the government's attorney that he may want to escort a possible witness into the hallway because "we don't know if this plea will go down."

Finally, the judge paid careful attention to appellant's expressions and demeanor, noting that "when [appellant] has a tough question, he does that little chew thing and he did that at the last question. So I may have confused him." Referring to this passage, the judge stated in her order denying the motion to withdraw the guilty plea that she "knew [appellant] so well that [she] was able to understand his facial expressions and determine whether or not [he] understood the proceedings. She further asserted that she "carefully assessed [appellant] at each

court "ensure[d] that [appellant] clearly understood what rights he was giving up by entering the plea ." *Id.* Several aspects of the plea record and several circumstances persuade us that the trial judge did not clearly err in finding that appellant did have the requisite understanding. First, during most of the plea proceeding, which covers fully thirty pages, appellant provided answers that responded logically to the court's questions. *Cf. State v. Shopteese,* 283 Kan. 331, 153 P.3d 1208, 1215 (Kan. 2007) (holding that plea was knowing and intelligent where "[t]he transcript of [the] plea hearing contains 45 pages [and o]n 30 of those 45 pages, the district judge directly addressed [the defendant], making painstaking inquiry, to which [the defendant] made appropriate responses"). Appellant also asked the court a question about the timing of sentencing that showed an apparent understanding of the significance of the plea proceeding.

More than once appellant took exception to the court's summary or characterization of his statements, showing that he was mentally engaged in the proceedings. (*e.g.,* "Court: Are you telling me you used more force than you had to use by using the knife. Defendant: ... [N]o, I'm not saying that" and "Court: So you're saying the evidence has convinced you that it's in your best interest to plead guilty? Defendant: I don't-don't say it that way .") Further,

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question" nd "was alert to [appellant's] responsiveness." It is precisely because the trial court is able to do this that we give great deference to a trial judge's observations and conversations with a defendant during a plea hearing. *See Edwards,* 766 A.2d at 988.

the court did not permit appellant merely to assent to the government's proffered account of the crime, but required him to provide his own factual account. Appellant did so, thereby "demonstrat[ing] that he was actively and mentally engaged in the plea process and understood the nature of the charges he was facing" when he "disput[ed] a specific portion of the factual proffer...." *Edwards,* 766 A.2d at 988.

In addition, appellant was able to provide detailed answers about matters not related to the crime. For example, there was the following exchange:

THE COURT: Now, Mr. Wallace, are you taking any medication at this time?
DEFENDANT: At this time I am receiving units of regular insulin along with 22 units of MPH insulin at the DC Jail.
THE COURT: Okay. Are you taking any other medication, perhaps, for you mental health?
DEFENDANT: Along with 100 milligram seizure medications called Dilanta.

Finally, in considering the equivocal and illogical statements that appellant made during the plea proceeding, we are constrained to bear in mind the testimony given by the mental health experts whose opinions the trial judge credited, to the effect that appellant was "capable of dissimulating, fabricating, prevaricating and malingering cognitive disabilities." We are mindful that, unlike this court, the trial court was in a position to assess whether appellant feigned confusion or indecision during the Rule 11 hearing and deliberately gave evasive answers, or instead

was actually confused. *Cf. People v. Marks,* 31 Cal. 4th 197, 2 Cal. Rptr. 3d 252, 72 P.3d 1222, 1237 (Cal. 2003) (deferring to the trial court because "[a]n appellate court is in no position to appraise a defendant's conduct in the trial court as indicating insanity, a calculated attempt to feign insanity and delay the proceedings, or sheer temper," and reasoning that "once a defendant has been found to be competent, even bizarre statements and actions are not enough to require a further inquiry" (internal citations and quotations omitted)). The trial court was in a position to assess whether appellant knowingly entered his plea to second-degree murder, actually understanding and acknowledging that he "didn't have to use" a knife.

The trial judge, who noted that she "took special care to ensure that [appellant] fully understood the proceeding" and "knew [appellant] so well that [she] was able to understand his facial expressions and determine whether or not [appellant] understood the proceedings," found that appellant "has been very responsive to my questions, and I think he is fully with us." We have previously held that when denial of a motion to withdraw a plea is "based primarily on [the judge's] own personal observations of and conversations with [a defendant], ... we accord great deference." *Edwards,* 766 A.2d at 988. Such deference is warranted here.

III.

Lastly, appellant argues that his sentence violated due process as it was based on the prosecutor's recitation (in the government's

sentencing memorandum and in argument before the court) of unsworn evidence, unverified statements by biased witnesses, and incidents of assault which appellant denied but had no opportunity to rebut.[31] We are unpersuaded by this argument. A judge has wide latitude when conducting a sentencing hearing, *Williams v. United States,* 427 A.2d 901, 904 (D.C. 1980), and may rely on evidence not admissible during trial. *Caldwell v. United States,* 595 A.2d 961, 966-67 (D.C. 1991). However, due process dictates that a "trial judge may not rely on mistaken information or baseless assumptions" and must instead rely only on "*reliable* evidence." *Harris v. United States,* 612 A.2d 198, 208 (D.C. 1992) (emphasis in original) (internal quotations and citations omitted). Nevertheless, when challenging the information recited during sentencing, appellant must prove that the sentencing judge actually relied on the unreliable evidence. *See Caldwell,* 595 A.2d at 967 ("[T]he judge heard appellant's explanation of [the disputed facts alleged during sentencing] and

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[31] Specifically, appellant takes issue with the government's statements that appellant was a "serial car-jacker" and had a history of knife violence against innocent civilians, the prosecutor's references to appellant having chased his girlfriend with a knife, and the prosecutor's allegation that appellant kept a "duffel bag of license plates that he collected." The first three items were based on statements by appellant's former girlfriend that were unsubstantiated by other witnesses. The last allegation, concerning the license plates, was made in the context of the prosecutor's assertion that one of those license plates ended up on the decedent's stolen car. Appellant asserts that the license plate in question was stolen while he was institutionalized negating any theory that he stole it.

did not purport to rely on them."). A defendant claiming that his sentence was based on improperly considered evidence is not entitled to have his sentence set aside unless it is shown "(1) that the challenged evidence is materially false or unreliable, and (2) that it actually served as the basis for the sentence." *United States v. Reme,* 738 F.2d 1156, 1167 (11th Cir. 1984); *see also United States v. Silverman,* 976 F.2d 1502, 1512 (6th Cir. 1992) (en banc) (quoting *United States v. Robinson,* 898 F.2d 1111, 1115-16 (6th Cir. 1990)); *United States v. Blade,* 811 F.2d 461, 469 (8th Cir. 1987); *Jones v. United States,* 783 F.2d 1477, 1480 (9th Cir. 1986); and *Moore v. United States,* 571 F.2d 179, 183-84 n. 7 (3d Cir. 1978).

Assuming, *arguendo,* that the government's statements in question were "materially false or unreliable," appellant has failed to prove that this information did "actually serve[ ] as the basis for the sentence." Appellant points to the trial judge's comments that appellant poses an "extreme danger ... to the community," that "[t]he sense that I have of [appellant] is that he is a very violent man," and that she "agree[s] with a good portion of the government's allocution...." These comments do not prove that the court relied on the government statements with which appellant takes issue.

There was a substantial amount of uncontested information and uncontested evidence presented during the sentencing hearing and during prior proceedings on which the trial court could draw for the view that appellant "is a very violent man" and

an "extreme danger ... to the community." The government recites several examples: Appellant had to be brought to court in shackles because he had scuffled with the United States Marshals. He assaulted four workers in a halfway home. There were pictures taken of appellant's girlfriend after she had been beaten by appellant. Appellant's sister had obtained a stay away order because of his attacks on her.

In addition, several doctors gave testimony during the competency hearing that indicated that appellant was dangerous. Dr. Pickar testified that his staff at St. Elizabeths "felt [appellant] was dangerous" and that his "violence wasn't ... predictable." He went on to say that he himself "think[s] that [appellant] is exceedingly dangerous." Dr. Patterson reported that appellant was a "predator" who would assault smaller men and women during his stays at St. Elizabeths. Dr. Lally noted similar behavior, saying that appellant was violent, hostile, threatened those around him, and "preyed on people." For sentencing, Dr. Lally submitted an affidavit stating that appellant's "violence appears to be increasing in its severity and frequency" and that this "indicate[s a] greater risk of future violence."

Further, the crime to which appellant pleaded guilty was a violent crime. As the government presents the case, appellant came up behind the decedent, stabbed him in the neck with a knife, and stole his car. Appellant's explanation at the plea proceedings was that the decedent punched him and

that he responded with excessive force. Either way, appellant's act was violent. Lastly, appellant's own counsel noted that appellant had violent tendencies. His sentencing memorandum to the court indicated that appellant's behavior was "aggressive and violent." With all of this information and evidence which the court could properly consider, we cannot hold that the court's explanation at sentencing that appellant is a "very violent man" or an "extreme danger ... to the community" reflected an abuse of discretion or denied appellant due process.[32]

CONCLUSION

For the foregoing reasons, appellant's conviction and sentence and the trial court's denial of appellant's motion to withdraw his guilty plea are

Affirmed.

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[32] Furthermore, appellant argued during the sentencing hearing that he disagreed with the four statements of which he now complains again. The fact that the sentencing judge heard appellant on these disputed allegations and did not purport to rely on them during sentencing gives us further assurance that the judge did not abuse her discretion during sentencing. See Caldwell, 595 A.2d at 967 (finding no abuse of discretion when an appellant denied some uncharged conduct and the judge did not "purport to rely" on that conduct during sentencing).

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

UNITED STATES OF AMERICA	:	Criminal No. F-7221-02
	:	
v.	:	Closed Case
	:	
ERIC WALLACE	:	

ORDER DENYING DEFENDANT'S MOTION TO WITHDRAW PLEA OF GUILTY

This matter comes before the Court on Defendant's Motion to Withdraw Plea of Guilty (hereinafter referred to as "Motion"), the Government's Opposition, the Defendant's Reply Brief and the Government's Response.

I. Procedural History

On October 10, 2002, the Defendant was arrested in connection with the fatal stabbing of Claude McCants Motion ¶ 1. The grand jury indicted the Defendant on May 28, 2002. *Id.* On November 10, 2003, the Court found the Defendant competent to stand trial. *Id.* On January 5, 2004, the Defendant pled guilty to second-degree murder while armed. *Id.* On January 15, 2004, the Court held a follow-up hearing, in which it completed the *Frendak* and

Innocence Protection Act inquiries.[1] Opposition at 4. On February 27, 2004, the Court sentenced the Defendant to thirty-five years in prison. *Id.*

II. Argument

A. Defendant's Claims

In his motion, the Defendant argues that his guilty plea should be withdrawn under Super. Ct. Crim. Rule 32(e) for two reasons (1) because justice requires withdrawal under the circumstances of this case and (2) there was a fatal defect in the Rule 11 proceeding when the guilty plea was taken. *Pierce v. United States*, 705 A.2d 1086, 1089 (D.C. 1997) (citing *Binon v. United States*, 658 A.2d 187, 189 (D.C. 1995). Motion ¶ 2. Defendant contends that even if the Court found the Defendant competent to stand trial, "it must also determine that the waiver of the right to trial is done 'voluntary, knowingly, and intelligently' to ensure a defendant's due process rights are protected. *Pierce*, 705 A.2d at 1089; *see also Godinez v. Moran*, 509 U.S. 389, 400 (1993)." Motion ¶ 3

a. Justice in this Case Requires Withdrawal

Defendant contends that he continued to assert his legal innocence, his desire to go to trial, his use of self-defense, his insanity defense and his failure to use excessive force. Motion ¶ 13. Defendant admits these statements were "confused and contradictory"

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[1] In *Frendak v. United States*, 408 A.2d 364 (D.C. 1979), the Court of Appeals held that the Court has a duty, where there is a **possibility** of an insanity defense, to determine, among other things, if the defendant can intelligently waive that defense.

but contends that only further confirms his lack of competence at the time of the plea. *Id.*

Defendant further states that, since the Court's competency determination, new evidence has become available that further proves he is not competent. *Id.* ¶ 4. Defendant argues that his acute diabetes and epileptic seizures result in severe dementia and cognitive dysfunction, including deeply impaired reasoning, memory and judgment. *Id.* ¶ 5; Def. Exh. 1-9. Dr. Hyde reviewed an electroencephalogram (hereinafter referred to as "EEG") of the Defendant taken on December 24, 2003 that evidenced permanent and irreversible brain damage. Motion ¶ 9; *see* Def Exh. 5, 15. Dr. Hyde also found that the Defendant became confused for several days after "a bout of severe seizures" and noted that the Defendant had a major seizure on December 18, 2003, eighteen days before his plea hearing. *Id.*

b. Defect in the Rule 11 Proceeding Requires Withdrawal

The Defendant argues that the interaction between the Court and the Defendant during the Rule 11 colloquy demonstrates that the Defendant did not voluntarily, knowingly, and intelligently waive his right to a trial. Motion 17.

> In order to comply with Rule 11 and ensure that a defendant voluntarily, knowingly, and intelligently agrees to the plea, a court must determine that the defendant has been apprised of the true nature of the charges against him and understands the nature of the charges to which the plea is offered. Motion ¶

15, Super. Ct. Crim. Rule 11(c) and (d); *see also Johnson v. United States*, 631 A.2d 871, 875 (D.C. 1993), citing *Henderson v. Morgan*, 426 U.S. 637, 643-44 (1976).

The failure to comply with the requirement set forth in *Rule* 11 *is* sufficient grounds for a court to grant a motion to withdraw guilty plea. Motion ¶ 15; see Gooding v. United States, 529 A.2d 301, 305 (D.C. 1987). Defendant contends that this Court failed to adequately fulfill the heightened responsibility under Rule 11 placed on it because of the competency issues raised by the Defendant. *Id.* 16-17. The Defendant believes that repeated contradictory statements at the time of the Rule 11 colloquial prove the Defendant's lack of understanding. *Id* ¶ 18. The Defendant does not suggest what further questioning the Court should have done to fulfill its heightened responsibility. The Defendant concludes that the Court must grant the Motion and permit the Defendant to withdraw his guilty plea to second-degree murder. Motion at 8.

B. Government's Opposition

The government argues that the Defendant has not presented any new evidence sufficient to support his claim that the Court's acceptance of his plea was "manifestly unjust". Opposition at 1. The Defendant pled guilty less then two months after the six-day competency hearing and the Court's determination that the Defendant was competent to stand trial. *Id.* at 4. Before accepting the plea, the Court had the opportunity to make its own observations and sought the input of counsel who reported that they did not e any

significant changes in the Defendant's condition since the competency finding. *Id.* Additionally, the Court asked if there was any reason not to accept the plea and Defendant did not point to any additional facts other then Counsel's pervious contention that the Defendant was incompetent. The Government submits that:

> [T]he totality of the surrounding circumstances, as well as the record of the defendant's plea contradict this allegation. . . . the record indicates clearly that the Court conducted the plea proceedings with special care because of the defendant"s mental health history, that there were no 'fatal defects' in the Court's colloquy, and that the defendant's plea was knowing, intelligent and voluntary.

Motion at 5.

The Government contends that the only "new" evidence presented by *the* Defendant was evidence not "available" to the Court at the time of the plea on January 5, 2004. Opposition at 19. This evidence includes the Defendant's hospitalization on December 18, 2003 and an "abnormal" EEG result from December 24, 2003. *Id.* at 20. The Government submits that Defense counsel was aware of this information but failed to ask for a continuance and when the Court specifically inquired into the incident: "have you seen any significant difference in functioning since the latest episode in the hospital" counsel replied "No, Your Honor. ... I can't say that I think that they're more significant now than they have been." *Id.* The Government also points out that Dr. Hyde referenced the

EEG in a letter in aid of sentencing prior to the January 15, 2004 court date. Opposition at 21.

The Government notes that despite the defendant's inconsistent answers at a couple points, he was able to consult with his attorneys or have clarifications by the Court each time he evidenced any confusion. Opposition at 32.

> The record fully supports the Court's finding that the defendant's plea was knowing, intelligent, and voluntary. Therefore, the defendant has not met his burden of presenting evidence sufficient to 'rebut the strong presumption of verity given to the statements he made to the court during the plea proceeding,' *Edwards v. United States*, 766 A.2d 981, 988-989 (D.C. 2001) (borderline mentally retarded defendant voluntarily entered plea of guilty), *see also Willis v. United States*, 468 A.2d 1320, 1324 (D.C. 1983) (defendant suffering from personality disorders voluntarily entered plea of guilty); cf *Southall v. United States*, 716 A.2d 183, 188 (D.C. 1998) (defendant voluntarily entered plea, nothing where the "trial judge has done everything possible to make clear the rights, implications, and voluntary nature of appellant's plea, the appellant must allege specific facts which explain away the presumptive validity of that plea").

Opposition at 32.

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Opposition at 32.

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The Government concludes that the Defendant was "both competent to enter his plea, and that his plea was knowingly, intelligent and voluntary. *Id.*

C. Defendant's Reply

In his Reply, the Defendant argues that "ongoing medical and psychiatric treatment since that time has continued to generate evidence that refutes the conclusion that Defendant is malingering." Reply ¶ 6. Since under the custody of the Bureau of Prisons the Defendant has required ongoing medical and psychiatric treatment and at the request of the psychology staff at the Federal Correctional Complex Petersburg, VA, Defendant was transferred to a Federal Medical Center (hereinafter referred to as "FMC") in Rochester, MN due to cognitive and adjustment difficulties. Id. ¶ 8-9. Based upon testing conducted at FMC Rochester, Dr. Daniel Carson, Staff Psychologist concluded that "Mr. Wallace has quite pronounced cognitive deficits. There is no evidence of intentional suppression of his performance (malingering)." Id. ¶ 11. "Those conclusions are reinforced by similar finding by Dr. Shrine. Among other indications, Defendants EEG results continue to show diffuse slowing, consistent with frontal lobe damage. Id. ¶ 12. While at FMC Rochester, Defendant was reported for a physical altercation with another inmate but Dr. Shrine concluded that he was "not competent and not responsible for this infraction". Id ¶ 13. Defendant contends that this is further proof the Defendant was not competent to enter a plea of guilty and therefore, withdrawal should be permitted in this case.

D. Government's Response

The Government maintains that the "defendant's reply purports to document the defendant's mental status while in prison *many months after his guilty plea." Response* at 1. The Government reiterates the Court's determination that the legal standard whether the defendant has a 'sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him.' Response at 4 (citing *Dusky v. United States*, 362 U.S. 402 (1960) (11-10-03 at 17-18) (emphasis added)). The Government, therefore, concludes that the records provided by Defendant with regard *to* his status after his plea "have little of no bearing on the Court's determination whether the defendant has the 'present ability' to consult with his lawyers and understand the plea at the time he pled guilty many months prior *to* the observations recorded in the records." *Id.* (citing *Dusky*, *supra*, 362 U.S. at 402 (citation omitted)).

The Government further contends that the records themselves were not drafted for the purpose of aiding the Court with a competency determination but in fact were only to be used for placement by the Bureau of Prisons. *Id.* at 5. Finally, the Government argues that the records provided by the Defendant are cumulative and that there is no new evidence that could permit the Court to alter its previous ruling.

III. Legal Standard

Under Super. Ct. Crim. R. 32(e), a court after sentencing may set aside the judgment of conviction

and permit the defendant to withdraw the plea, but this relief is authorized only when it is required to "correct manifest injustice." *Edwards v. United States*. 766 A.2d 981, 987 (D.C. 2001). A post-sentence motion to withdraw a guilty plea is tested under the manifest injustice standard, which is a higher standard of review than compared to the "fair and just" standard used to review a pre-sentence motion to withdraw a guilty plea. *See Williams v. United States*, 656 A.2d 288, 293 (D.C. 1995); *Springs v. United States*, 614 A.2d 1, 4(D.C. 1992). Accordingly, to withdraw a guilty plea after sentencing a movant must demonstrate that (1) to allow the plea to stand would be manifestly unjust, and that (2) the plea proceeding was fundamentally flawed such that there was a complete miscarriage of justice. *See Edwards v. United States*, 766 A.2d at 987 (citation omitted).

To determine whether it would be manifestly unjust to allow the plea to stand the Court may look, collectively, at three factors: (1) whether the defendant asserts his or her legal innocence; (2) the length of the delay between entry of a guilty plea and the desire to withdraw it; and (3) whether the accused has had the full benefit of competent counsel at all relevant times. While the District of Columbia Court of Appeals ("DCCA") has not specifically held that these three factors must be considered in reviewing a post-sentence motion to withdraw a guilty plea, there is controlling authority that suggests these three factors may be used in determining whether manifest injustice has occurred. *See United States v. Jackson*, 122 Daily Wash. L. Rptr. 1, 5 (D.C. Super.

Ct. January 3, 1994) (finding the three factors used in reviewing a pre-sentence motion to withdraw a guilty plea also can be used in reviewing a post-sentence motion to withdraw a guilty plea); *see also United States v. Russell*, 686 F.2d 35, 39 (D.C. Cir. 1982) (citation omitted) (finding a trial court considering a post-sentence motion to withdraw a guilty plea should consider three factors: (1) strength of the defendant's reason for withdrawing plea, including whether the defendant asserts his innocence to the charge; (2) possible prejudice to the government as result of the defendant's request; (3) whether the defendant's misunderstanding of the collateral consequences of the plea was the result of government's misleading statements or the defendant's own ignorance).

D.C. Code § 23-110(a) provides, in pertinent part, that "[a] prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose sentence, (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence." D.C. Code § 23-110(a).

When a motion is filed pursuant to D.C. Code § 23-110, the court shall "grant a prompt hearing thereon, determine the issues, and make findings of fact and conclusions of law with respect thereto," unless the

Court finds that the motion, files, and records conclusively show that the Defendant could not establish facts warranting relief. D.C. Code § 23-1 10(c); *Pettaway v. United States*, 390 A.2d 981, 983-84 (D.C. 1978). Furthermore, "a hearing is unnecessary when the motion consists of (1) vague and conclusory allegations, (2) palpably incredible claims, or (3) allegations that would merit no relief even if true." *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993) (citation omitted).

IV. Analysis

A. Defendant's Competency

The Defendant claims that he was not competent to enter a plea of guilty and that subsequent findings further prove the Defendant's incapacity. After a five-day competency hearing, during which the Court heard from numerous doctors, the Court, after considering all the evidence presented, made factual findings and determined that the Defendant was competent. At that time, the Court found:

> Competency is presumed until a judicial determination of incompetence is made. *Hughes v. United States*, 308 A.2d 238. The test for a defendants competency is set forth in *Dusky v. United States*, 362 U.S. 402 (1960). The test is whether a defendant has a "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding — and whether he has a rational as well as factual understanding of the proceedings against him." *Id.* at 402.

Of course, the decision as to whether a defendant is competent to stand trial is a mixed question of law and fact *Weiter v. Settle*, 193 F. Supp. 318, 322 (W.D. Mo. 1961). A substantial body of case law on the issue of competency reflects the position that a Defendant's impairment in one specific function will not *per* se render a defendant incompetent to stand trial. There is no bright-line test, including the myriad of tests regularly employed in the field of psychology that either prove or disprove competency under the *legal* standard. Rather courts must rely on the totality of the specific clinical features of an individual defendant's mental condition to properly assess his competency.

Addressing the complicated factual issue of whether an individual with proven mental or psychological deficiencies can be considered legally competent for trial, courts have noted that a defendant need not understand "every legal nuance" of a case in order to be found competent. *State v. Guatney*, 299 N.W. 2d 538, 543-44 (Neb. 1980). Similarly, in *United States v. Glover*. 596 F.2d 857, 867 (9th Cir. 1979), the Court of Appeals noted that the "fact that a defendant might not understand the proceedings unless they are explained to him in simple language would put an additional burden upon counsel but certainly does not establish that the defendant is incompetent to stand trial." 5N *also People v. Valentino*, 356 N.Y.S. 2d 962 (Nassau Ct. 1974).

> While there is no doubt that Mr. Wallace suffers some cognitive deficits, the sole question for this court is whether these impairments preclude him from understanding the nature of the charges against him, the nature of the proceedings and participating in his defense. It is evident from the record do not.
>
> Here, the evidence of malingering is more powerful than the evidence of significant progressive deterioration. The evidence shows that the Defendant is clearly performing at times in a manner inconsistent with, contrary to, and beyond the capabilities of his claimed medical condition. In sum, based on the record before it, this court is unable to find that the Defendant has proven incompetence pursuant to § 24-301(b).[2] Therefore, the Defendant is hereby found to be malingering and remains competent to stand trial in this case.

Tr. 11-10-03 at 17-19.[3]

Additionally, the Court made specific findings of fact, which led to the Court's conclusion. Tr. 11-10-03 at 3-17, Exh. A.

On January 5, 2004, the Defendant plead guilty to second degree murder while armed. Defendant asserts there was evidence that the Defendant became confused for several days after "a bout of severe

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[2] The 2005 version of the D.C. Code is § 24-531.04(b).

[3] References to the transcript of the hearing will be cited at "Tr." preceded by the transcript date and page number.

seizures" and that because the Defendant had a major seizure on December 18, 2003, approximately eighteen days before his plea hearing, that he was incompetent at the plea hearing. Motion 19. The Court, however, was aware of the Defendant's seizure and questioned defense counsel about the incident.

> The Court: And let me ask you this, Mr. Handzo, have you seen any significant difference in functioning since this latest episode in the hospital?
>
> Mr. Handzo: No, Your Honor. My only visit with him after this episode was last night. As the Court knows, my view is that there are significant problems here. *I can't say that I think that they're more significant now than they have been.* I'm not an expert on those things.

Tr. 01-05-04 at 5 (emphasis added).

The Defendant contends that there was an EEG of the Defendant taken on December 24, 2003 that evidenced permanent and irreversible brain damage. Motion ¶ 9; *see* Def Exh. 5, 15. However, the Government noted that Dr. Hyde referenced the EEG in a letter in aid of sentencing prior to the January 15, 2004 court date. The EEG was also discussed on January 5, 2004. Tr. 01-05-04 at 40-42. The Court was, therefore, aware of the EEG prior to the Defendant's sentencing. Opposition at 21. All the evidence was considered. No evidence was presented

that there was any change in the Defendant's since the time of the competency findings.

The Defendant claims that subsequent medical evaluations of the Defendant while he has been in the custody of the Bureau of Prisons further refute the conclusion that the Defendant is malingering. Reply ¶ 6. The Government contends that there is no new evidence reflecting the condition of Defendant's competency *at the time he entered his guilty plea.* Response at 1 (emphasis added). The Government argues that any evidence presented from the time after the Defendant entered into his guilty plea is irrelevant according to the standard because it deals with the Defendant's competency after the plea. Response at 6. The Court finds that the information presented by the Defendant is irrelevant and does not alter the Court's analysis of the Defendant's competency at the time of his plea. The medical records from the Defendant's residency with the Bureau of Prisons are for a time after the Defendant entered into his guilty plea. The Court previously stated during the competency hearing that the legal standard was a "sufficient present ability" and, therefore, subsequent medical records do not change the Court's determination of Defendant's ability *at the time he* entered into his guilty plea. *See Dusky*, 362 U.S. 402 (emphasis added). Furthermore, the Court finds the only relevant records were previously provided to the Court either in whole or in part through expert testimony.

Additionally, the Defendant's mental state was understood and considered by the Court at the time

of the plea. On the date of the guilty plea was taken, the Court knew that the Defendant's plea hearing might take more time because of the Defendant's medical history and took special care to ensure that the Defendant fully understood the proceeding. The Court stated, "If [the Defendant] didn't understand, we can go through it again. 1'[m] willing to take as much time as we need to resolve it *in either direction* in this case, and I anticipated this one wouldn't be very *easy.*" Tr. 01-05-04 at 14-15 (emphasis added). The Court was prepared to spend as much time as needed with the Defendant, regardless of whether or not the Defendant decided to plea guilty.

The Court took extra precautions to ensure the Defendants rights were not violated. The Court made sure the Defendant knew he was charged with murder in the first degree and that he was pleading guilty to murder in the second degree. *See* Tr. 01-05-04 at 10, 14, 19, 21 and 38. The Court continued to talk to the Defendant about a possible insanity defense and the difference between going to trial and entering a guilty plea. *Id.* at 12, 13,14, 15, 16, 17, and 18. The Court also discussed the Defendant's ability to use a defense of self-defense. *Id.* at 16, 31, 32, 33 and 37. The Court repeatedly told the Defendant that he could stop at any point and ask questions to the Court or to his lawyers and the Court stopped throughout the proceedings to ask the Defendant if he had any questions. *Id.* at 9, 19, 23 and 38. The Court carefully assessed the Defendant at every question. The Court even took a break so that the Defendant could talk with his counsel about

his decision to plead guilty. *Id.* at 14. The Court made sure the Defendant was not taking any medicine that would impair his judgment. *Id.* at 20. The Court continuously asked the Defendant whether or not he wanted to plead guilty and confirmed that he wished to plead guilty. *Id.* at 14, 16, 19, 23, 34, and 37. Finally, the Court, noting that it was alert to Defendant's responsiveness, concluded that the Defendant was competent and stated:

> I'm satisfied that the defendant understands his rights and is entering this plea freely and voluntarily and that there's a factual basis for it. I'm also satisfied that he understands the proceedings and is competent to proceed. He has been very responsive to my questions, and I think he's fully with us. So on that basis, I will accept the plea and find that Mr. Wallace is guilty of murder in the second degree while armed.

Tr. 01-05-04 at 39.

B. The Plea Was Entered Into Knowingly and Voluntarily and There was No Manifest Injustice

As evidenced above, the Court took the time to ensure that the Defendant plea of guilty was both knowingly and voluntary. "[A] motion to withdraw a guilty plea filed after sentencing is subject to a high standard. *See Edwards v. United States*, 766 A.2d 981, 987 (D.C. 2001). In order to withdraw a plea, defendant 'must not only demonstrate that the plea was manifestly unjust, but must also show that 'the plea process was fundamentally flawed such that

there was a complete miscarriage of justice." *Id.* (*quoting Williams v. United States*, 656 A.2d 288, 293 (D.C. 1995)." Opposition at 32. The Court knew the Defendant so well that it was able to understand his facial expressions and determine whether or not the Defendant understood the proceedings. Specifically, the Court stated, "I recognize, too, I might be talking a little too fast for him. I have that habit, and I watched his videotape and when he has a tough question, he does that little chew thing and he did that at the last question. So I may have confused him." Tr. 01-05-04 at 15.

Where the trial judge has done everything possible to make clear the rights, implications and voluntary nature of a defendant's plea, the defendant is not entitled to a hearing on a motion to vacate the guilty plea. *Gregg v. United States*, App. D.C. 395 A.2d 36, (1978). The transcript in this matter clearly demonstrates the Court's continued efforts to ensure that the Defendant was aware of all his Constitutional rights that would be waived upon acceptance of his guilty plea. Therefore, the Court rejects the Defendant's claim that he did not knowingly and voluntarily plead guilty.

The Court has considered the other factors in a withdrawal of plea. First, the Court considered whether the defendant had asserted his legal innocence. The Defendant in this case claimed he was not guilty by reason of insanity. Motion ¶ 13. The Defendant, however, decided that he would plea guilty instead of going to trial and using an insanity defense. Tr. 01-05-04 at 16, 2123, 34-36, 37-38. Furthermore, the

Defendant admitted that he used too much force against the victim. Tr. 01-05-04 at 32-33. "The defendant's version of the events suggested that he stabbed the victim with a butter knife during an altercation." Opposition at 27; *see* Tr. 01-05-04 at 31. Secondly, the length of delay between entry of the guilty plea and the desire to withdraw it in this case the time between the plea and the withdrawal is just over seven months. Finally, whether the accused has had the full benefit of competent counsel at all relevant times, which the Defendant had and is not contesting. Therefore, there is no basis on this record to grant withdrawal of the plea in this case. *Pettiford v. United States*, App D.C. 700 A.2d 207 (1997). The appellant has failed to meet his burden of a manifest injustice. *See Willis v. United States*, 468 A.2d 1320 (D.C. App. 1983).

V. Hearing on the Motion

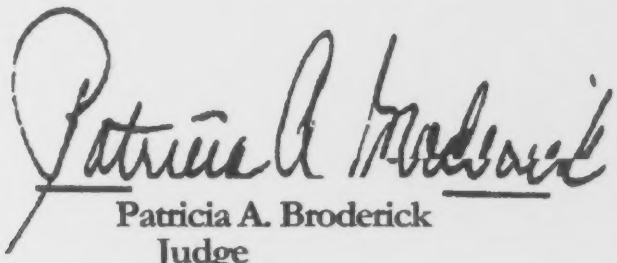
Finally, no evidentiary hearing is required on the Defendant's motion. A full competency hearing was already completed just before the plea and there are no indications of any change in the Defendant since then. Because "the existing record provides an adequate basis for disposing of the motion," and the Defendant's claims relating to subsequent medical reports would "merit no relief even if true," the Court will deny the Defendant's motion without a hearing. *Ready v. United States*, 620 A.2d 233, 234 (D.C. 1993); D.C. Code § 23-110(c).

VI. Conclusion

Based on the relevant case law, the pleadings and the entire record herein, the Court concludes that

the Motion to Withdraw Plea of Guilty should be denied and there is no need for a hearing on the Motion.

Accordingly, it is on this 27th day of October 2005, hereby ORDERED that Defendant's Motion to Withdraw Plea of Guilty is DENIED.



Patricia A. Broderick
Judge
Signed in Chambers

APPENDIX C

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CRIMINAL DIVISION

UNITED STATES OF AMERICA	)	
	)	Criminal
	)	Action
versus	)	Number
	)	F-7221-02
ERIC WALLACE,	)	
Defendant.	)	

Washington, D.C.
November 10, 2003

The above-entitled action came on for a hearing before the Honorable PATRICIA BRODERICK, Associate Judge, in Courtroom Number 117, commencing at approximately 10:45 a.m.

* * * *

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PROCEEDINGS

MR. AMBROSINO: Michael Ambrosino for the United States.

MS. LUCAS: Diana Lucas on behalf of the United States.

MR. WARD: Alex Ward for Eric Wallace.

MR. HANDZO: David Handzo for Mr. Wallace.
MR. TAYLOR: And Lee Taylor Mr. Wallace.
THE COURT: And I'm pleased to say Mr. Wallace is here. All right, please have a seat. I think this is the type of case where-- well, first of all, I want to say I really appreciated the hearings and the witnesses were all excellent. The presentations were excellent and I appreciate that from everyone.
This is the type of case where one might have done a written ruling, but my written rulings take a long time.
So, rather than do that, I do have a rather long oral ruling for you and a transcript will be available, but it will save time in my issuing one, so let me begin. I want to start with a background.
A competency screening which was entered as Defense Exhibit 2-F was performed on Mr. Wallace on January 2nd, 2002 in connection with three misdemeanor assault cases pending in Superior Court at that time. Case numbers M-9224-01, M-1738-01 and M-1226-02.

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At the screening the Defendant was fully oriented, but his attention, concentration and memory functions appeared to be impaired on mental status examination tests. His abstract reasoning ability was also impaired. There was no delusional or bizarre ideation, but the Defendant indicated he had some occasional auditory hallucinations prior to the onset of seizure activity. The Defendant reported a history of diabetes and seizure disorder.

Doctor Boss concluded at the end of that screening interview that, quote, "The Defendant is unable to participate in court proceedings at this time. Mr. Wallace appeared to have significant cognitive limitations that may or may not be related to his chronic medical condition. At present, it is unclear if his condition will significantly improve and a minimum of 30 to 45 days is recommended before re-evaluation. It may be useful for Mr. Wallace, if Defense counsel can spend even more time with him to go over the details of his case and some legal strategy. Multiple repetitions in addition to frequent discussion may help Mr. Wallace recall what he

needs to know
in order to better inform his choices and ability to participate," close paren. Hospitalization was deemed necessary at that time.

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Thereafter, on January 3rd, 2002, thirds, the Defendant submitted to a competency examination at the Barton Hall facility at St. Elizabeth.
In a report dated January 30, 2002, the Defendant was found not competent to stand trial.
In reaching this conclusion, the clinical psychologist noted that the Defendant was alert but not fully oriented. Mr. Wallace denied ever experiencing hallucinations and had no delusions or bizarre thought content. His speech was difficult to follow and there were long pauses often lasting several minutes.
Mr. Wallace did poorly on tasks assessing attention, concentration and memory function. He could not repeat a list of four words and had a difficult time performing simple math calculations.
A test called the MacCAT-CA was administered and the results indicated, quote, clinically significant impairment." He scored six points out of possible 44.

Mr. Wallace was admitted to St. Elizabeth's on February 7, 2002 in connection with his misdemeanor cases. In a report dated March 27th 2002, Defense Exhibit 2-H, Doctor William Richie, a staff psychiatrist, examined Mr. Wallace and the following determinations were made at a diagnostic staff conference. "He is incompetent to stand trial by virtue of not

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having a factual or rational understanding of the proceedings pending against him and being unable to consult with counsel with a reasonable degree of rational understanding." The Defendant was diagnosed with cognitive disorder non-specified and dementia due to general medical condition. The report noted that the Defendant was receiving anti-psychotic drugs at the time. In a report dated May 24th, 2002, Defense Exhibit 2-J, the Defendant had been re-examined by Doctor Richie. The conclusion following that exam was that the Defendant still was not competent and that it was unlikely that he

would attain competency in the foreseeable future.
The Defendant was diagnosed with dementia due to
general medical condition and was receiving both anti-
psychotic medication and seizure medication.
On October 10, 2002, the Defendant was released
from St. Elizabeth upon dismissal having the pending cases due
to the Defendant's incompetence.
The Defendant is charged in a stabbing death of
Claude McCants on that very same date, October 10, 2002 in
the current case F-7221-02.
According to the facts that came out of the
Defendant's preliminary hearing, Mr. McCants bled to death
from a stab wound to the neck. His 1999 Ford Explorer was

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parked in the eleven hundred block of Fourth Street,
Northeast.
On October 18, 2002, the Decedent's vehicle was
recovered from a gas station parking lot on Indian Head
Highway. It had been there for several days.
When recovered, the vehicle had a Maryland tag
attached over the original Mississippi tag.

Inside the car was mail matter and medical prescriptions in the name of Eric Wallace. Blood drops were found and bloods smearing. A CD with the Defendant's fingerprint was found as well as a bloody steak knife. Some clothing was also found.

On November 8, 2002, the police went to the home of Mr. Wallace. He accompanied them to the police station where he gave a full statement. It has been entered as a government exhibit.

In the statement the Defendant said he had just been released from St. Elizabeth Hospital. He gave a detailed statement concerning his activities that day including the fact that he stabbed the decedent and then took his car.

He indicated that the decedent kicked him, but had no weapon. The Defendant admitted to stabbing the victim with a steak knife he had brought earlier from his mother's house.

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On November 13, 2002, Doctor Lawrence Oliver performed a competency screening on the Defendant in the D.C. Superior Court cellblock. According to Doctor Oliver, the Defendant was alert, polite, cooperative and fully oriented. There was no evidence of hallucinations, delusions or bizarre thought content. His affect was flat but not inappropriate and Mr. Wallace explained he was upset about his current legal circumstances. The Defendant was logical and coherent and his attention, concentration, mathematical and abstract thinking all appeared unimpaired. His memory for recent and remote events seemed intact, as did his recent recall. Of note to that interview, Doctor Oliver wrote that, quote, "Mr. Wallace received competency training when he was at John Howard. When questions about legal issues were posed in a clear, direct manner, Mr. Wallace was able to demonstrate a good basic knowledge of the judicial process and the roles of various court officials.

He was aware of the charge against him and the gravity, his plea options, rights and the concept of plea bargaining. In addition, he was aware of the necessity and importance of cooperating with his lawyer and behaving appropriately in the courtroom."

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Doctor Oliver concluded that the Defendant was competent to stand trial. There was no further challenge to competency following that report. On December 3rd, 2002, a preliminary hearing was held. The Court made a finding of substantial probability and held the Defendant under 1325 A. On March 25, 2003, the Defendant was returned to St Elizabeth for a criminal responsibility study. The defendant was found to be criminally responsible for his actions on October 10th, 2002. During that stay at St. Elizabeth, neuropsychological evaluation was completed on May 5, 2003, which is Defense Exhibit 2-O. The Defendant was returned to the D C Jail on June 30, 2003. He remains in the Mental Health Unit

where he can
16 be observed by staff and his medication monitored.
17 In the discharge summary from St Elizabeth's, the
18 discharge diagnosis was Dementia due to Epilepsy and
19 Diabetes Mellitus type I with Behavioral Disturbance at the
20 first Axis. There was no diagnosis on Axis II and Axis III
21 was Epilepsy and Diabetes Mellitus Type I, Insulin
22 dependent. A civil commitment proceeding remains stayed
23 pending this case.
24 Conclusions of Fact.
25 In November of 2002, the Defendant was found

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1 competent as it was found that he had sufficient present
2 ability to consult with his lawyer with a reasonable degree
3 of rational understanding and a rational as well as factual
4 understanding of the proceedings against him and that is the
5 standard under Dusky versus United States at 3621 US 402.
6 His competency was not challenged for purposes of
7 arraignment or preliminary hearing. Following his criminal

responsibility finding, he challenged the finding of competency.
All parties agree that the Defendant suffers from dementia as a result of diabetes and seizure disorder or
epilepsy.
The Defendant has resultant cognitive impairments.
Records show he has struggled with managing his glucose
levels for many years.
Along with the medical problems of management, some
evidence was presented that the Defendant was at times
non-compliant with his diet, hoarded sugar and desserts and
checked his dilantin.
According to Doctor Hyde, hypo or hyper glycemia can cause delirium and seizures can result in loss of
consciousness and confusion in post seizure, as well as an
impairment of cognitive function.
The Defense suggests that the Defendant's deterioration and impairment began a few years ago, but

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progressed rapidly between April and September of 2003 due

to the continuing effects of the diabetes and frequent seizures.

They argue the Defendant is now experiencing significant progressive brain impairment and is now so substantially impaired he's now incompetent for trial.

No particular medical incident is noted as responsible for the sudden and progressive deterioration claimed.

The Defense presented evidence of the Defendant's cognitive impairments through the testimonies of Doctor Hyde, a MD neurologist and Doctor Pickar, a psychiatrist, as well as numerous exhibits including 2 A - T, 4, 5, 6 and 7.

These exhibits show that the Defendant had high glucose levels in 2001 along with cognitive impairment.

In April of 2002 a neurology report cited cognitive dysfunction, delirium and a tendency to perseverate and noted abnormalities on the EEG.

In April of 2002, a neuro-psychological gave the Defendant an IQ of 55 in the severely impaired range, comparing him to those of a group of elderly individuals

with dementia.
Other evidence of brain damage such as poor eye tracking, poor judgment and thinking were also identified.

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Mini mental status exams were given as well as tests for malingering and tests to ascertain the Defendant's ability to understand the legal process. The Defendant was found not to be malingering.
Doctors Hyde and Pickar reviewed all the records in the case and talked with the staff and interviewed the Defendant.
Both concluded that the Defendant was suffering frontomental secondary to diabetes and epilepsy; that the condition was progressing for the worst and that the defendant was not malingering.
The Government, while not contesting that there is dementia and impairment takes the position that the impairment is mild and that the Defendant is malingering both psychotic and cognitive impairment and that he remains competent for trial.

The Government presented the testimony of Doctors Ray Patterson, Lawrence Oliver and Stephen Lally as well as numerous exhibits. All three of these doctors concluded that the defendant was malingering both psychosis and cognitive impairment. Doctor Patterson, a forensic psychiatrist who previously worked as the Director of Forensic Services for the Commission on Mental Health Services interviewed the

Page 13

Defendant as recently as October 14, 2003. He also reviewed records and talked with staff. He concluded that the Defendant was competent and malingering. He did not disagree with the medical records provided by the Defense, but noted that they had not considered earlier normal EEG, CT and MRI test results. He further opined that Defendant was performing behaviorally beyond the tested IQ of 55. Doctor Patterson noted inconsistencies in the Defendant's performance in cognitive areas. The Defendant

clearly reported events at one time, but at another time could not remember them. He was spontaneous and able to talk in a reasonable way on some matters, but could not do it with other examiners. His response to a question about the colors of the flag boarded on the absurd. People legitimately demented could answer that question, according to Doctor Patterson. Doctor Patterson stated that the case was not close here. He also stated that he agreed with Doctor Richie, a staff psychologist, who noted the Defendant was, quote, capable of dissimulating, fabricating, prevaricating and malingering cognitive disabilities in excess of his documented deficits," unquote. Doctor Patterson based his conclusions on numerous

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factors and gave specific examples. These included the variations in the way the Defendant responded both between. different examiners as well as within individual

interviews.
The conduct he exhibited in a videotaped statement
to the police which represented remarkable variations
inconsistent with his alleged mental condition.
His ability to negotiate the hospital where he was
violent and assaultive and adjust totally to the jail where
He keeps to himself and stays out of trouble.
His lack of increasing symptoms after being taken
off psychotic medication. His reporting of psychotic
symptoms, namely hallucinations in a form inconsistent with
genuine and legitimate hallucinations and his variability on
his answers to the same legal questions within a matter of
mere weeks.
Doctor Patterson noted that variability in which
the Defendant showed improvement in his behavior, as he did
on the drawing on the mini mental status examine, was
inconsistent with the Defendant's alleged progressive
damage. The Defendant could not be improving and still be
significantly impaired.

Doctor Oliver observed the defendant in the jail and in interviews approximately ten month apart. He noted a marked difference between in the Defendant's interaction between other people in the Jail and his interaction with

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Doctor Oliver. He found that at his September 2003 interview, the Defendant had a good memory, was able to give phone numbers and social security numbers, background and other details which coincided with answers he had given in November 2002. However, he professed a lack of knowledge on the salient issues of the charges and legal proceeding. Doctor Oliver concluded that the Defendant was intentionally producing grossly exaggerated symptoms for gain. He could find no other explanation for the difference In behavior. Doctor Lally, a forensic psychologist, formed the opinion that the Defendant was malingering

psychotic
symptoms and some degree of cognitive impairment.
This was based on observations, records, conclusions in the report and conversations with doctors, as
well as the testimony of Doctors Hyde and Picador.
He pointed to the Defendant's claimed hallucinations as an example of his malingering psychosis.
He explained, consistent with Doctor Patterson, how the
Defendant's reported hallucinations were not consistent in
their reports and not consistent with genuine hallucinations.
As to cognitive malingering, Doctor Lally observed
that the Defendant was slow in responses to questions about

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the court case; but when the doctor stopped taking notes or
switched to the topic of the crime itself, the Defendant's
speech was more spontaneous and his answers more on target.
Additionally, Doctor Lally administered two malingering tests. One of them showed that the Defendant

was providing careless responses which invalidated the test results and could be consistent with malingering. Doctor Lally concluded, consistent with Doctors Patterson and Oliver that the Defendant was malingering. The inconsistencies within the individual interviews, the impairment in some areas and then function in others as well as the contrast between evaluations was notable and too great. There was no medical explanation for that behavior. Further testimony from Dr. Lally was instructive. He noted that malingerers tend to mix symptoms but remember the event to give exculpatory information as Mr. Wallace does. Additionally, mental status can fluctuate in cognitive performance, but variability in the moment is different. There should be some consistency. Mr. Wallace shows inconsistency. Also, improvement does not occur in a progressive condition and yet in some instances the Defendant showed improvement went specific actions. For

example, the

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drawings on the mini mental status and his ability to answer questions in September for Doctor Pickar when he couldn't answer them for the Government doctor. Competency is presumed until a judicial determination of incompetence is made. According to Hughes versus the United States at 308 A.2nd 238 the test for the Defendant's competency is set forth in Dusky versus the United States, 362 U.S. 402 which I cited earlier. The test is whether the Defendant has, quote, a sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as factual understanding of the proceedings against him. Of course, the decision as to whether a defendant is competent to stand trial is a mixed question of law and fact. According to Weiter versus Seattle at 193 F. Stipp. 318 322 from the Western District of Missouri 1960. A

substantial body of case law on the issue of competency reflects the position that a defendant's impairment in one specific function will not per se render a defendant incompetent to stand trial. There is no bright line test including the myriad of tests regularly employed in the field of psychology that either prove or disprove competency under the legal

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standard. Rather, courts must rely on the totality of the specific clinical features of an individual defendant's mental condition to properly assess his competency. Addressing the complicated factual issue of whether an individual with proven mental or psychological deficiencies can be considered legally competent for trial, courts have noted that a defendant need not understand, quote, every legal nuance, unquote, of a case in order to be found competent. State versus Guatney, 299 N.W. 2d 538, 543-

44
12 Nebraska 1980.
13 Similarly, in United States versus Glover, 596 F.2d
14 857, 867, Ninth Circuit 1979, the Court of Appeals noted
15 that the fact a defendant might not understand the
16 proceedings unless they are explained to him in simple
17 language would put an additional burden upon counsel, but
18 certainly does not establish that the Defendant is
19 incompetent to stand trial.
20 While there is no doubt that Mr. Wallace suffers
21 some cognitive deficits, the sole question for this Court is
22 whether these impairments preclude him from the rational
23 understanding of the charges and proceedings against him.
24 It is evident from the record that they do not, nor
25 do they preclude him from consulting with his lawyers.

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1 Here a review of the evidence presented, including
2 the testimony of witnesses and all of the

exhibits forces
the conclusion that the evidence of malingering is far more
powerful than the evidence of significant progressive
deterioration.
The evidence shows that the Defendant is clearly
performing at times in a manner inconsistent with, contrary
to and beyond a reasonable doubt the capabilities of his
claimed medical condition.
In sum, based on the record before it, this Court
is unable to find that the Defendant has proven incompetent
pursuant to 24-301(b) and therefore the Defendant is hereby
found to being malingering and remains competent to stand
trial in this case.
I have received a motion from counsel bifurcation.
I have not resolved it because I have been awaiting a
response from the Government.
MR. AMBROSINO: Your Honor, we're going to file a
short response. I will try to file it is this afternoon.
If not, first thing Wednesday, I will finish it. It will be
a two page response.
Part of my reason for brevity I know Defense

counsel indicated that they are not quite sure whether they
are going to pursue that position.
THE COURT: And maybe counsel will save us some

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time. He's standing.
MR. HANDZO: Yeah. I can't resolve the question yet. What I told Mr. Ambrosino who raised the question is
whether that's what we really wanted, but we're still
looking at it.
I didn't want to file a motion for bifurcation
until we got a response and we will try to resolve that as
quickly as we can.
MR. AMBROSINO: And our response will literally be
two pages and the only other motion we are planning on
filing is we will file in liminae to oppose any mention to
the jury of the prior competency finding. We will not
oppose their expert extracting information from the medical
records pertaining to Mr. Wallace's stay during that whole
time -- his first stay at St. Elizabeth when they made that

competency determination, but our position will be that the
original competency determination is irrelevant to the issue
of criminal responsibility which is the issue that the jury
will be determining and it would really be very confusing to
the jury because it's a completely different legal standard
and it would been irrelevant and confusing and for those two
grounds we would just move in liminae to oppose any of the
experts or lawyers making mention of that finding.
MR. HANDZO: Mr. Ambrosino mentioned that to me as
we walked in the courtroom today.

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THE COURT: You need time to think about that?
MR. HANDZO: Right.
THE COURT: Okay. Now, I wanted to pose a concern.
How long do we think that this trial, including motions and
such will take?
MR. HANDZO: It will not be quick, your Honor.
Just thinking about it, you know, there will be an insanity
defense and my guess is that to the extent that our doctors

testify similar to what you have already heard that there is a dementia that they think is more serious than the Government thinks it is, we will have a replay of all of the malingering testimony and so I think to begin with you will get all of the testimony we had with the competency hearings plus evidence that relate to the test itself.

THE COURT: So, I could insert my previous notes into that?

MR. HANDZO: Yes. It will ease the Court's note taking test, but that amount of time obviously will--

THE COURT: Well, here is my concern, counsel. We're due to start next Monday and I'm assuming with motions and stuff we would not be picking a jury until at least Tuesday or Wednesday. Tuesday I have to leave early; probably by three. I have to be somewhere at three and so we wouldn't have a full day and then we running into Thanksgiving. I'm not working the Wednesday before and

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Court is closed Thursday and Friday and the next

week there
are only three days because of judicial training and then we
have one more week and I'm out of here after the 12th.
MR. AMBROSINO: Your Honor, I don't think that those-- I think the Court is not sitting the Wednesday
before and after because I think that would create a whole
host of problems with the jurors, quite frankly, and while
the Government-- I agree with Mr. Handzo.
I think the insanity portion of the case will take approximately the same amount of time. You will see some
different witnesses because you will hear from the people.
from St. Elizabeth's that made the criminal responsibility
finding instead of Doctor Oliver and there will a replay of
both sides' experts with respect to that issue.
THE COURT: That was three-and-a half days right.
There
MR. AMBROSINO: But I will tell you this. This is not a witness intensive case. We have a lot of quick witnesses just to kind of explain the chronology of events.
The three primary witnesses, frankly, will be the mobile crime technician who collected everything because

there is a lot of evidences that came out of the car because
this is a circumstantial case aside from the confusion, of
course, which is an important component of the case; but I
think the mobile crime officer will be a pretty lengthy

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witness and then you will here from the DNA expert.
Now, I think in this particular case our DNA expert
will not be as long as in some trials because the Defense is
not really attacking our DNA evidence. It's more of a
"Well, he did it in self defense;" or "He didn't know what
he was doing."
So, I don't think that will be as long as it is in
some cases and then, of course, we will play the confession
which will stay awhile if we choose to do that. We don't
have to choose to do is that and I have not tactically
decided whether we will do that; but we do do that, that
will take a whole afternoon.
THE COURT: Well, I wanted to let you know what

were doing. We're here for three days next week; three days
the next week and then the following week.
So, that will make it really hard to pick a jury;
but if you think that's sufficient time to try the case and
get the jury back, I mean, I'm here. I'm here to work, but
I'm concerned that we will run right up to the 12th and it
would be very hard for me to turn that kind of case over to
someone sitting with all of those issues and I'm out of the
country as of the 13th. So, I wouldn't be able to help you.
MR. HANDZO: I understand the Court's concern. I
thought we, a week ago, had some conversations about that.
I think everybody is concerned and I think

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particularly the Government-- if we didn't go on the 17th,
it looked like it could be awhile before we got another
date.
I don't know what the Court's calendar--
THE COURT: Well, my calendar is backed up. I can
put three cases on a day instead of two cases on a

day and
see what happens.
As it happens, I have three cases this coming Monday. So, one has been converted to a status and I have another case up that day. There is always more than one case up on a day.
I'm just concerned because of the length of this case and I think the Court found that the information from the doctor was an awful lot to process and it took a lot of time, a lot of intense time; and for a jury to give it that kind of time, I don't want to rush them.
I have a background in the field and it still took me a lot of time and we will not be talking to jurors necessarily about that.
MR. AMBROSINO: Well, one consideration, I suppose, your Honor, would be the idea-- and I'm not sure whether your Honor would be inclined to consider this because you have spent a lot of time with this case and invested a lot of time and resources in listening to the experts-- would be certification.

THE COURT: All of them were wonderful. I have to say you found fabulous experts. I mean, there are no credibility issues here as the expert go, but you were saying, Mr. Ambrosino.

MR. AMBROSINO: Well, I was one thinking to possibly certifying the case out on the 17th. That's one consideration we have.

THE COURT: Well, as far as certifying, everybody has the same issues with Thanksgiving weekend and we're all in training the following week.

MR. HANDZO: The other concern I have is because of the uncertainties in the schedule, a lot of the witnesses obviously are professionals. It's better, obviously, if you can been fairly certain about when they will have to testify.

THE COURT: You can never be. Even when the trial starts, you can't be.

MR. HANDZO: I know that's absolutely true.

THE COURT: I will leave this in your hands, counsel. You can let me know next Monday whether you will go forward or not or actually on Friday. I would try to squeeze you in as early as possible

in the New Year if you decide to do it that way, but I want
you to have enough time and I'm concerned about the breaking
it up and I'm just concerned that deliberations will go over

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the time that I'm away.
MR. AMBROSINO: If your Honor was inclined to put it
off, the one issue we have is that Ms. Lucas who is, I
think, integral to this prosecution because of her
experience at St. Elizabeth and all of the time she has
invested in this case is pregnant and so she will be out of
pocket for a long time. From March forward or from April
forward.
So, if the Court-- if for whatever reason the
parties determine that it would be difficult to go forward
on the 17th, we would be asking for something right after
the holidays like in January. Either the first or second
week of January.
That would be the only way I could conceive that we
could put this thing over.

Not that I'm saying we're inclined to do so because I have to check with our expert.
THE COURT: I have two cases up each of the two Mondays. I can add a third. I'm out the week of the 19th for a solid week.
MR. HANDZO: Of January, your Honor?
THE COURT: Uh-huh. And then I have three cases up on the 26th. So, I could squeeze it in knowing that there would be a week's break, but at least there would be a solid week and we would be back.

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MR. AMBROSINO: If that were to happen, perhaps your Honor would have a motions hearing on the 17th so that the parties could at least know--
THE COURT: I would consider that.
MR. AMBROSINO: Especially so we would know whether we were talking about one or two trials.
MR. HANDZO: Yes, I would agree.
MR. AMBROSINO: Because our response will be very short. I don't think the bifurcation issue itself will not be nearly as complex.
I understand our Drew motion was very lengthy

and
that might be something the Court would want to mull over
for awhile, but I think the bifurcation will be pretty clear
cut what our arguments are.
Where the Court ends up, I don't know, but I think it's something that probably could be resolved next Monday
and that way at least that will help us just in terms of
estimating the time and then figuring out how much of a
block of time we will need.
MR. HANDZO: I guess what I would suggest, there
are others motions that it would be helpful to resolve. The
Drew motion, for example, telling us something about how
we're trying the case.
THE COURT: I appreciate that, but if I have
another trial up on Monday, though, that I'm taking, I think

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that would be a very lengthy motion and it would be hard for
me to take that and do my other trial and I have not seen a
response to it yet.
MR. HANDZO: You will, dully. We had filed a

response.
THE COURT: Well, we can't find the jacket. That might be where it is.
THE DEPUTY CLERK: We have the jacket.
MR. HANDZO: It might be the best thing a t this point for counsel to confer and let the Court know.
THE COURT: Why don't you let me know and if you want to go, I can also check with my colleagues and see if there is anyone who would take the case.
I thank counsel again. You have been very professional and it was very well done and it's been a pleasure.
Thank you. See you on Monday. If we don't hear from you, my law clerk will start tracking you down.
MR. AMBROSINO: We will contact the Court by Thursday.
THE DEPUTY CLERK: So, we will set this for Monday.

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CERTIFICATE OF REPORTER

I, Donna K. Hawkins, an Official Court Reporter for

I, the Superior Court of the District of Columbia, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the hearing in the case of the **UNITED STATES OF AMERICA versus ERIC WALLACE**, Criminal Action NumberF-7221-02, in said court on the 10th day of November, 2003.

I further certify that that the foregoing 27 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings.

In witness whereof, I have hereto subscribed my name, this the 24th day of November, 2003.

DONNA K. HAWKINS
Official Court Reporter

APPENDIX D

Standard Form 507

	Report on Eric Wallace NEUROLOGY CONSULTATION Continuation of S. F. 513 (Strike out one line) (Specify type of examination or data)

DC Department of Mental Health
Neurology Clinic – St. Elizabeth's Hospital
Smith Building, 2700 MLK Jr. Ave, SE, 22032

NEUROPSYCHOLOGICAL EVALUATION REPORT

Name:	Eric Wallace
DOB:	12.31.1965
Age:	37 years
Years of Education:	14 years

/S/ DOCTOR'S SIGNATURE/DATE (Continue on next page)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name – last, first	REGISTER NO. 207 564	JHP WARD 9 Pretrial
REPORT ON	OR CONTINUATION OF	

Standard Form 507
GENERAL SERVICES ADMINISTRATION AND INTERAGENCY COMMITTEE ON MEDICAL RECORDS
FIRMR(41 CFR) 201-
OCTOBER 1975 207 107
U.S. Government Printing Office 1986 -

Medication:	Dilantin, Seroquel, Glucophage, Insulin
Dates of Assessment:	04.30.2003, 05.06.2003, 05.08.2003
Examiner:	Svenja Wacker, M.A.
Date of Report:	05/05/2003

REASON FOR REFERRAL

This neuropsychological evaluation was requested by Paul Montalbano, Ph.D., Pretrial Chief of John Howard Pavilion (JHP), to clarify Mr. Wallace's diagnosis in the context of a criminal responsibility evaluation. He was arrested on 10.10.2002 for fatally stabbing a stranger, only hours after being released from an earlier admission to St. Elizabeth's Hospital. Mr. Wallace, who has suffered from Type I Diabetes Mellitus since age 9, from monthly tonic-clonic seizures since age 12, and was hospitalized more than twenty times for episodes of hypoglycemia, has also experienced two seizures since his admission to John Howard Pavilion on 03.25.2003. He has been displaying signs of severe cognitive deficits and increasing confusion. Assessment results will serve to examine the degree of neurocognitive compromise, given these neuropsychological risk factors, and will aid in formulating an opinion regarding his criminal responsibility. Mr. Wallace was informed of the purpose of this evaluation and the limits of confidentiality. He demonstrated that he understood these limits and agreed to cooperate with the evaluation.

TECHNIQUES EMPLOYED

Clinical Interview with Mr. Wallace
Clinical Interview with Mrs. Wallace (mother)
Dementia Rating Scale (DRS)
Record Review
Test of Memory Malingering (TOMM)
Wechsler Adult Intelligence Scale — Third Edition (WAIS-III)
Wechsler Memory Scale — Third Edition (WMS-III)
Wide Range Achievement Test – Revision 3 (WRAT 3)

BACKGROUND

Following information was acquired through a clinical interview with Mr. Wallace. Due to his status as pre-trial patient with acute cognitive deterioration, however, he may be an unreliable historian of his background information.

Occupation:

- Various long-term positions in security work
- Repeated employment terminations for health reasons (seizures)

Education:

- Graduated from high school with grades in the C and D range
- Never failed a grade
- Denied learning problems of special education placements

- Completed two years of business studies at University of District of Columbia (UDC)
- Limited intellectual stimulation since school

Medical:

- Diabetes mellitus (insulin dependent) since age 9
- Reported more than twenty hospitalizations for hypoglycemic shock
- Most recent hospitalization in 04.2003
- Experienced generalized tonic-clonic seizures since age 12, but did not receive treatment until recently
- EEG report evidenced severely abnormal brain wave activity as manifested by diffuse generalized slowing and abnormal epileptiform activity, which is consistent with bilateral cerebral dysfunction; normal CT scan results according to a report from John Stiller, M.D.
- Currently prescribed medication includes: Dilantin, Seroquel, Glucophage, Insulin
- Reported 5-6 incidences of mild, sports-related concussions
- Denies consumption of alcohol and illegal substances

Legal:

- Arrested on 10.10.2002 for stabbing Claude McCants and stealing his car following the fatal assault
- During preliminary hearings the courts decided that Mr. Wallace was found "worthy of indictment" for murder in the second degree
- Previous admission to St. Elizabeth's Hospital for several misdemeanor assault charges

BEHAVIORAL OBSERVATIONS

Mr. Wallace is a 37-year-old African American male of average height and slender build. He presented slightly disheveled, but reasonably clean, and seemed alert and properly oriented to place, person, and time within three days of the exact date. He, however, appeared to not understand the reason of his admission to St. Elizabeth's Hospital, and denied any psychiatric symptoms. At the time of the interview, he evidenced no signs of bizarre thinking, hallucinations, or delusions. In describing the circumstances of his offense he displayed impaired insight, ambivalence, and no trace of remorse or feelings of guilt, but portrayed the murder as an act of self-defense, while omitting details of the actual event. Mr. Wallace generally seems to be an unreliable informant of details from his personal history, struggled with long-term recall, and was unable to estimate possible cognitive ability.

Throughout the evaluation, he conducted himself in a calm and cooperative manner, but remained affectively flat and apathetic, and made little eye contact. His motor and speech behavior was remarkable for hypermotoric and impoverished passivity and paucity. When responding to questions his answers were circumstantial and tangential in content, and he failed to answer several questions posed to him altogether.

TEST RESULTS

Malingering

The Test of Memory Malingering was administered to help determine if Mr. Wallace was giving his best effort. Results of the test suggest he was not malingering his memory performance. Despite excessively long test taking time and his obviously slowed processing of stimuli, his performance produced valid results, indicating a motivation to engage effort in fulfilling the tasks posed to him rather than purposefully choosing incorrect answers.

General Cognitive Functioning:

On tests of General Intellectual Functioning, Mr. Wallace 's scores fell within thc Mildly and Severely Impaired bracket.

The WAIS-III was administered to measure Mr. Wallace's general intellectual functioning. His Full Scale IQ was found to be 55 (<1st percentile,

Severely Impaired Range). He obtained a Performance IQ of 62 (1st percentile, Mildly Impaired Range) and a Verbal IQ of 57 (<1st percentile, Severely Impaired Range), indicating that his test scores on verbal and nonverbal tasks are equally deficient. He displayed substantial difficulties on all tasks presented to him, and failed to show any relative strengths throughout his cognitive profile. His answers reflected an inability to understand and formulate neither concrete nor abstract verbal ideas beyond a very elementary level, and he evidenced little insight into comprehension of simple social issues (Verbal Comprehension Index: 59, <1st percentile, Severely Impaired range). He could not mentally manipulate verbally provided information when it exceeded three number units, and it seemed virtually impossible for him to retain or mentally manipulate such material (Working Memory Index: 51, <1st percentile, Severely Impaired range). Grasping and organizing nonverbal concepts was equally difficult for Mr. Wallace (Perceptual Organization Index: 65, 1st percentile, Mildly Impaired Range). His aptitude to process simple information quickly is also severely disrupted (Processing Speed Index: 63, 1st percentile, Mildly Impaired Range).

Dementia Screening

On measures of early dementia signs, Mr. Wallace performed below the cutoff level.

Given Mr. Wallace's serious deficits on tests of cognitive functioning and memory, the Dementia Rating Scale (DRS) was administered to determine potential early stages of premature cognitive deterioration. In comparison to a healthy, elderly population, he performed below dementia cutoff scores on all but two subscales. While his attention and construction (such as copying simple designs) abilities do not meet dementia criteria, his overall memory and verbal concept formation were severely impaired. On a test of verbal fluency he could only list very few items, but his deficient performance was likely the result of extremely slow processing, rather than initiation difficulties. Overall, Mr. Wallace's scores suggested significantly impaired cognitive functioning comparable to those of a group of elderly individuals with dementia.

Achievement

On tests of achievement, Mr. Wallace scored at a 7th grade level for word recognition,, a 3rd grade level for arithmetic, and at a 2nd grade level for spelling. His fund of general information was Mildly Impaired.

Mr. Wallace's performance on the WRAT-3 indicates that his reading comprehension ability is equivalent to a 7th grade level (79, 8th percentile, Borderline Impaired range), and much better

developed than his arithmetic (55, <1st percentile, Severely Impaired range) and spelling (52, <1st percentile, Severely Impaired range) achievement. His fund of general knowledge appears equally limited (2nd percentile, Mildly Impaired range). The achievement area is typically used as an estimate of "premorbid" functioning in patients with suspected cognitive decline, as these scores typically are the last to wane during a deteriorating cognitive process. The WRAT-3 Reading versus Verbal Comprehension difference of 20 standard score points suggests at least some deterioration has occurred. Mr. Wallace's scores, when compared to his FSIQ, suggest that he has either experienced substantial cognitive losses affecting even these more robust areas of functioning, such as school-based learning, or, his deficient cognitive abilities only allowed him to absorb very limited information in educational settings. These possibilities are not mutually exclusive.

Learning and Memory

On measures of learning, Mr. Wallace exhibited performances between Borderline Impaired and Severely Impaired. On a memory measure, he performed in the Average to Impaired range.

The Wechsler Memory Scale — Third Edition (WMS-III), Word Lists, was administered to measure Mr. Wallace's ability to learn verbally presented information. When given lists of words, he only recalled three out of twelve items (5th percentile,

Borderline Impaired range) for several trials and four items on the fourth trial. After a short delay, he only responded with two correct list words, and on a second list he recalled none of the items correctly (<1st percentile, Severely Impaired range). Mr. Wallace appeared to benefit little from repeated exposure to material and failed to absorb additional information with each trial, indicating an impaired ability to acquire new material. His confusion of list items and intrusions of extraneous words further confirms an impression of verbal learning deficits.

His WMS-III score on the word list measure of verbal memory was at the 16th percentile (Below Average range), showing that he retained most of the little information he had managed to acquire earlier. In fact, his percent retention score was Average. However, when he was asked to recognize such previously presented material he could not discriminate between old and new words, suggesting he is especially vulnerable to interference (<1st percentile, Severely Impaired range). Although some material may be stored, access is deficient. His overall impairments on learning and memory are not surprising, given his general level of intellectual functioning.

NEUROPSYCHOLOGICAL FORMULATION

In sum, factors in Mr. Wallace's history that may cause or indicate neuropsychological difficulty include academic problems, childhood-onset diabetes mellitus with many hyperglycemic attacks, a long-term history of untreated seizures with positive

EEG findings, several incidences of possible sports-related concussions, and recent periods of delirious thinking. Mr. Wallace's general cognitive functioning ranges between Below Average and Severely Impaired with the majority of his scores in the impaired range, and is comparable to that of elderly individuals with mild dementia. He seemed to have most difficulties on tests of verbal comprehension, information acquisition, and recognition, as well as on working memory. He evidenced Mildly Impaired functioning on visual-spatial organization and speeded processing. His memory recall was Below Average. Mr. Wallace's performance on neuropsychological testing appears to be a true reflection of his abilities. He did not malinger.

Given his educational record of C/D high school performance and successful completion of two years at DC University, his current level of cognitive functioning likely represents a deterioration from a premorbid point. In a phone interview, Ms. Wallace confirmed the impression that her son used to communicate and function more effectively, and that he experienced a noticeable decline affecting his speech, memory, and processing speed starting approximately two years ago. While his fund of academic knowledge and achievement, a normally robust yardstick for premorbid functioning, also reflects impaired ability, deficiencies in spelling and calculation may simply be the result of severely depressed overall abilities, rather than deficient learning. However, the questionable quality of his

DC public education (including his time at UDC), where students with learning problems are encouraged to participate in higher education, along with Mr. Wallace's early onset seizures and diabetes may have interfered with his absorption of school-based material. With the available information it is therefore difficult to determine how effective Mr. Wallace's cognitive processing was at its best, but it is clear that he has experienced some degree of deterioration that renders him intellectually severely impaired. The types of cognitive deficits experienced by Mr. Wallace warrant a diagnosis of Dementia Due to Seizure Disorder and insulin-dependent Diabetes Mellitus, Type I (294.1).

Mr. Wallace carries several risk factors, which may have increased his susceptibility to such drastic mental decline. Diabetes Mellitus, for example has been linked to vascular dementia and may accelerate the process of senile dementia. In patients with Type I Diabetes, general circulatory function is frequently disrupted, delicate blood vessel networks damaged, and patients carry an increased risk of suffering "silent strokes" (Ott, A., Stolk, R.P. & Van Harskamp, 1999). Though he had a normal CT scan, perhaps an MRI would be appropriate. In addition, his life-long history of seizures was left untreated and may have cumulatively contributed to the depression of his cognitive abilities. Whereas mild head injuries alone cannot create the observed deficits, his reported concussions may have further exacerbated his thinking problems, as well as

reported frequent hypoglycemic attacks so severe that they caused a great many hospitalizations.

SUMMARY AND RECOMMENDATIONS

Mr. Wallace is a 37-year-old African American male, who currently lives as an inpatient at John Howard Pavilion (JHP), Pretrial Ward 9, since his admission in March of 2003 due to a charge of Second-Degree Murder. He was referred for a neuropsychological assessment by Paul Montalbano, Ph.D., Pretrial Chief of John Howard Pavilion (JHP), to examine potential organic contributing factors, possibly related to his medical conditions (diabetes and seizures) to his obviously disrupted cognitive functioning. Mr. Wallace presented with significantly slowed speech, some disorientation, and impaired insight into his recent cognitive losses. His affect remained blunted during the evaluation, but he cooperated willingly with testing and appeared to invest good effort on all tasks.

Overall, Mr. Wallace's current cognitive functioning was significantly disrupted across all domains. Deterioration likely occurred due to lacking cortical blood circulation secondary to life-long diabetes, and also as a result of the seizures he has suffered since age 12, which were medically unaddressed until recently.

Recommendations include:

1. Based on the assessment results Mr. Wallace should receive a diagnosis of Dementia Due to

Seizure Disorder and insulin-dependent Diabetes Mellitus (294.1).

2. Re-evaluation of neuropsychological functioning in 1-2 years is recommended to determine the rate of cognitive deterioration experienced.

3. Mr. Wallace's compliance with medical treatment and medication should be closely

Standard Form 507

	Report on Eric Wallace
	NEUROLOGY CONSULTATION
	Continuation of S. F. 513
	(Strike out one line) (Specify type of examination or data)

monitored to maintain stable blood sugar levels and minimize seizure frequency.

/s Svenja Wacker, M.A.
Neuropsychology Intern

/s Sidney Binks, Ph.D
Supervising Neuropyschologist

/S/ DOCTOR'S SIGNATURE/DATE (Continue on next page)

PATIENT'S IDENTIFICATION (For typed or written entries give: Name – last, first	REGISTER NO. 207 564	JHP WARD 9 Pretrial

REPORT ON OR CONTINUATION OF

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GENERAL SERVICES ADMINISTRATION AND INTERAGENCY COMMITTEE ON MEDICAL RECORDS
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OCTOBER 1975 207 107
U.S. Government Printing Office 1986 -

OPPOSITION BRIEF

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No. 07-785

In the Supreme Court of the United States

ERIC R. WALLACE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's unconditional guilty plea waived his right to appeal the trial court's pretrial ruling finding him competent to stand trial.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 936 A.2d 757.

JURISDICTION

The judgment of the court of appeals was entered on September 13, 2007. The petition for a writ of certiorari was filed on December 12, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

STATEMENT

Following an unconditional guilty plea in the Superior Court of the District of Columbia, petitioner was convicted of one count of second-degree murder while armed, in violation of D.C. Code §§ 22-2103 and 22-4502, and sentenced to thirty-five years of imprisonment, to be followed by five years of supervised release. Peti-

tioner subsequently moved to withdraw his guilty plea, and the trial court denied the motion. The court of appeals dismissed petitioner's appeal from the guilty-plea conviction and affirmed the trial court's denial of petitioner's motion to withdraw his plea. Pet. App. 4a, 50a.

1. Petitioner was found incompetent to stand trial on misdemeanor assault charges. The United States petitioned to have petitioner civilly committed and sought to detain him pending resolution of the commitment petition. Petitioner successfully opposed the latter request, and he was released from custody on October 10, 2002. Pet. App. 2a.

At approximately 9 p.m. that evening, petitioner encountered Claude McCants on 4th Street, N.E., in Washington, D.C., as McCants was talking on his cellular phone while standing near the passenger side of his vehicle. Petitioner stabbed McCants in the neck with a steak knife and drove off in McCants's vehicle, leaving McCants to bleed to death. Pet. App. 76a-77a; Gov't C.A. Br. 2.

Eight days later, McCants's car was recovered from a gas station parking lot in Maryland. The car had a Maryland tag attached over the original Mississippi tag. Inside the car were mail matter and medical prescriptions in petitioner's name, a CD with petitioner's fingerprint, petitioner's blood-stained clothing, and a bloody steak knife. Police questioned petitioner, who admitted in a videotaped interview that he had stabbed McCants and stolen his car. Pet. App. 76a-77a; Gov't C.A. Br. 2.

2. On November 9, 2002, petitioner was presented in the Superior Court of the District of Columbia on a charge of second-degree murder while armed. The trial court ordered petitioner to undergo a competency screening examination. Dr. Lawrence Oliver of the

court's Legal Services Division found that petitioner was competent to stand trial. Pet. App. 2a-3a, 78a-79a; Gov't C.A. Br. 2-3. A separate criminal-responsibility study concluded that petitioner was not insane at the time of the offense. Pet. App. 2a. The trial court found petitioner competent and set a trial date. Pet. App. 80a; Gov't C.A. Br. 3.

On August 12, 2003, petitioner filed a motion challenging his competency determination. In response, the trial court ordered a more comprehensive competency examination, which Dr. Oliver performed. Dr. Oliver found that petitioner was competent to stand trial and expressed the opinion that petitioner was malingering. Pet. App. 2a-3a. The government also had petitioner examined by two additional experts, Drs. Raymond Patterson and Stephen Lally, who submitted written reports generally in accord with that of Dr. Oliver. Gov't C.A. Br. 6-9. Neither of petitioner's competency experts, Drs. Thomas Hyde and David Pickar, submitted a written report. *Id.* at 4.

The trial court convened a five-day competency hearing and received testimony from all five experts, as well as voluminous exhibits, including medical records, reports from the government and court-appointed experts, and a videotape of petitioner's confession. Pet. App. 3a. Petitioner's experts testified that he was incompetent and not malingering. *Id.* at 82a-83a. The government did not dispute that petitioner suffered from dementia and mild impairment, but contended that he was malingering and did not suffer from psychosis or severe cognitive impairment. *Id.* at 83a.

On November 10, 2003, the court found petitioner competent to stand trial. Pet. App. 71a-93a. The court concluded that "the evidence of malingering [was] far

more powerful than the evidence of significant progressive deterioration." Pet. App. 93a. Petitioner's conduct was simply inconsistent with the impairments he claimed, including an IQ of 55 and a tendency to hallucinate; the court credited the conclusions by the government's experts and the court-appointed expert that petitioner was functioning at a cognitive level well above his purported IQ and that his reports of hallucinations were both variable and inconsistent with legitimate symptoms. *Id.* at 84a, 86a. Accordingly, the court concluded, petitioner had failed to carry his burden of proving that he is incompetent. *Id.* at 93a.

On January 5, 2004, petitioner entered an unconditional guilty plea to one count of second-degree murder while armed. After the required colloquy, the trial court found petitioner competent to plead guilty, and accepted his plea. Pet. App. 3a-4a; Pet. C.A. App. 77-93. The court held a follow-up hearing ten days later, in accordance with *Frendak* v. *United States*, 408 A.2d 364 (D.C. 1979), and confirmed as required by that case that petitioner understood the consequences of failing to assert the defense of insanity, that he was fully informed of the alternatives available to him, and that he was freely choosing to waive that defense. Pet. App. 4a & n.3. At the conclusion of the *Frendak* hearing, the trial court found that petitioner "underst[ood] the consequences of the choice to waive the [insanity] defense," and that his "waiver [was] voluntary and intelligent." Pet. C.A. App. 96-97. The court sentenced petitioner to thirty-five years of imprisonment, to be followed by five years of supervised release. Pet. App. 1a. Petitioner appealed.

3. While his direct appeal was pending, petitioner filed a motion to withdraw his guilty plea "to correct

manifest injustice."[1] The District of Columbia Court of Appeals stayed petitioner's direct appeal until that motion was resolved.

On October 27, 2005, the trial court denied petitioner's motion to withdraw his plea. Pet. App. 51a-70a. The court explained that the Rule 32(e) standard requires the defendant to make a two-part showing: "that (1) to allow the plea to stand would be manifestly unjust, and that (2) the plea proceeding was fundamentally flawed such that there was a complete miscarriage of justice." *Id.* at 59a.[2] The court found that petitioner had not satisfied either part of this test. It explained that the evidence on which petitioner relied as new either had been raised at petitioner's plea hearing; had been considered before petitioner's sentencing; or was legally irrelevant to petitioner's competency to plead guilty because it came from the period after he had been sentenced and incarcerated. *Id.* at 64a-65a. The court reiterated that it had thoroughly considered the relevant evidence and, indeed, "knew [petitioner] so well that it was able to understand his facial expressions and determine whether or not [he] understood the proceedings." *Id.* at 68a.

4. In a consolidated opinion, the court of appeals dismissed the direct appeal from the guilty-plea convic-

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[1] "A motion to withdraw a plea of guilty or of nolo contendere may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw the plea." D.C. Super. Ct. R. Crim. P. 32(e).

[2] The court of appeals later declined to determine whether the test was conjunctive or disjunctive, because petitioner had failed to meet "either prong of the test." Pet. App. 8a & n.9.

tion and affirmed the denial of petitioner's motion to withdraw his guilty plea. Pet. App. 1a-50a.

a. The court first explained that an unconditional plea of guilty waives "virtually every possible avenue of appeal." Pet. App. 4a (quoting *Bettis* v. *United States*, 325 A.2d 190, 194 (D.C. 1974)). "[T]he only issues that are appropriately raised in an appeal from a conviction entered after a guilty plea are the exercise of jurisdiction by the trial court and the legality of the sentence imposed." *Id.* at 5a (quoting *Carmichael* v. *United States*, 479 A.2d 325, 326 n.1 (D.C. 1984)). The court noted that "some jurisdictions" have exempted competency issues from this general waiver rule, but it concluded that it was not "free to depart" from its precedents adopting a waiver rule. Pet. App. 6a-7a. Defendants could still move to withdraw their guilty pleas, as petitioner had. *Id.* at 5a.

The court rejected petitioner's contention that the waiver rule conflicts with this Court's precedents. The court distinguished *Pate* v. *Robinson*, 383 U.S. 375 (1966), which held only that "a defendant is entitled to procedural due process to determine whether he is competent," because in this case petitioner had been amply afforded the required procedural protections. Pet. App. 5a n.5. "Nothing in *Pate*," the court explained, "compels a holding that a defendant who has received the benefit of [valid competency determinations] must be allowed to challenge his competency again on direct appeal following a guilty plea." *Ibid.*

The court also concluded that its waiver rule was not inconsistent with *Menna* v. *New York*, 423 U.S. 61 (1975), or *Blackledge* v. *Perry*, 417 U.S. 21 (1974). In both of those cases, this Court concluded that a guilty plea does not waive a claim that the State entirely lacks

power to indict the defendant. Pet. App. 7a n.7 (citing *Blackledge*, 417 U.S. at 30-31). A defendant's challenge to his competency to stand trial is not such a claim. *Ibid.*

b. The court then concluded that the trial court had not abused its discretion in denying petitioner's Rule 32(e) motion. The court of appeals first noted that its review of that motion required it to address the trial court's competency determination. Pet. App. 8a-10a. The court of appeals then conducted an exhaustive review of the evidence presented at the competency hearing, *id.* at 12a-18a, of the trial court's competency ruling, *id.* at 18a-26a, and of the trial court's Rule 32(e) order, *id.* at 26a-34a. In light of that review, the court of appeals concluded that the trial court's competency finding had been based on a "permissible view[] of the evidence" and had reasonably resolved the dispute between the testifying experts. *Id.* at 26a (citation omitted). The post-hearing evidence that petitioner had submitted "contained nothing that required the trial judge to conclude that [petitioner's] competence to stand trial or plead guilty had diminished." *Id.* at 32a-33a. The court also reviewed the guilty-plea colloquy in great detail and concluded that petitioner had not shown that the proceeding was fundamentally flawed. *Id.* at 34a-46a.

ARGUMENT

Petitioner renews his contention that the Due Process Clause entitles him to direct appellate review of the trial court's competency finding, notwithstanding his guilty plea. The court of appeals correctly rejected that claim, and its decision does not merit further review. Petitioner's unconditional guilty plea operated to waive review on appeal of claimed independent constitutional deprivations in pre-plea trial-court rulings. Petitioner,

moreover, received appellate review of his claim that he was not competent to plead guilty, an issue that is not meaningfully different from the pre-plea competency determination that petitioner seeks to challenge. Not only is there no conflict of authority warranting this Court's review, and not only does the availability of *conditional* guilty pleas render the issue of far less importance than petitioner suggests, but the court of appeals' holding that the denial of petitioner's motion to withdraw his plea was not an abuse of discretion renders this case an inappropriate vehicle in any event for further review of petitioner's due process claim.

1. The court of appeals' holding is consistent with this Court's precedents. The general rule that a guilty plea waives pending claims of legal error, including constitutional error, is well established. As this Court has explained, "[w]hen a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett* v. *Henderson*, 411 U.S. 258, 267 (1973); see also, *e.g.*, *United States* v. *Broce*, 488 U.S. 563, 570 (1989); *McMann* v. *Richardson*, 397 U.S. 759, 766-768 (1970). The courts of the District of Columbia have adopted the same general rule. Pet. App. 4a-5a. The rule of waiver plainly satisfies due process in the ordinary case.

As petitioner notes (Pet. 19-22), this Court has recognized a narrow exception to this general rule of waiver for constitutional claims "that—*judged on its face*—the charge is one which the State may not constitutionally prosecute." *Broce*, 488 U.S. at 575 (quoting *Menna* v. *New York*, 423 U.S. 61, 63 n.2 (1975)). The prime exam-

ple is a claim of double jeopardy that is apparent on the face of the indictment, see *id.* at 574-575, because a valid claim of double jeopardy entitles a defendant to immediate dismissal of the indictment so that he is not "forced to 'run the gauntlet' a second time." *Abney* v. *United States*, 431 U.S. 651, 662 (1977) (establishing that denial of a motion to dismiss an indictment on double-jeopardy grounds is immediately appealable). Thus, in *Menna*, this Court held that the defendant could appeal on double-jeopardy grounds even after his guilty plea; "the State [was] precluded * * * from haling [the] defendant into court" at all, and so could not rely on a waiver rule. 423 U.S. at 62. Similarly, in *Blackledge* v. *Perry*, 417 U.S. 21 (1974), the double-jeopardy-like protection against prosecutorial vindictiveness absolutely precluded the State from "[t]he very initiation of" more serious charges against the defendant in retaliation for his exercise of the right to appeal. *Id.* at 30-31. His challenge to those charges, therefore, was not waived by his guilty plea. See *ibid.* In each of those cases, the constitutional claim was not foreclosed because "the constitutional infirmity in the proceedings lay in the State's power to bring any indictment at all." *Broce*, 488 U.S. at 575.

A defendant's claim that he is incompetent to stand trial does not fall into the narrow class of claims that the Constitution excludes from the waiver rule. A competency claim does not affect the validity of the charge "judged on its face." Indeed, an incompetent defendant is not entitled to walk free; rather, the government is entitled to seek to restore him to competency, during which time the charge remains pending and the trial may remain in "suspension." *Medina* v. *California*, 505 U.S. 437, 448 (1992); see *Sell* v. *United States*, 539 U.S.

166, 180 (2003); *Cooper* v. *Oklahoma*, 517 U.S. 348, 365 & n.21 (1996). In a case like this one, neither the "very initiation of proceedings" nor the government's power to "hal[e] [the] defendant into court" is in question. *Broce*, 488 U.S. at 575 (citations omitted).

"*Menna* and *Blackledge*," the court of appeals correctly explained, "do not dictate that in this circumstance the defendant must be able to bring a freestanding appeal of the competency determination as though he had never pled guilty." Pet. App. 7a n.7. The court of appeals' reading of *Menna* and *Blackledge* is correct and does not warrant further review.[3]

2. Petitioner also asserts (Pet. 12-18) that the court of appeals' decision contributes to an existing divide among state courts concerning whether an unconditional guilty plea waives the right to appeal an adverse competency finding. Petitioner does not identify any disagreement warranting the Court's review of his due process argument.

Of the decisions petitioner cites to support his argument, only three are from state courts of last resort, and one of these three is altogether inapposite. In *Thompson* v. *Commonwealth*, 56 S.W.3d 406 (Ky. 2001), the

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[3] Petitioner also relies tangentially on *Pate* v. *Robinson*, 383 U.S. 375 (1966), in which this Court held that the right to a competency hearing could not be waived. *Id.* at 384-386 (holding that "Robinson's constitutional rights were abridged by his failure to receive an adequate hearing on his competence to stand trial"). The issue here is altogether different: petitioner received a full and thorough adjudication of his competency, and the trial court determined that he was competent both to stand trial and to plead guilty. Nothing in *Pate* entitled petitioner to plead guilty while preserving a direct appeal on competency from his guilty-plea conviction. Once a defendant has been found competent to waive constitutional rights, it is not "contradictory" (*id.* at 384) to conclude that he may waive further review of competency.

court did not consider whether the defendant had waived the question of competency by pleading guilty. Rather, the defendant's *counsel* had separately waived the competency issue even though the trial court had not held a competency hearing. *Id.* at 408. The Kentucky Supreme Court held that a state statute gave the defendant a non-waivable right to a competency hearing following a mental evaluation. See *id.* at 408-409 (citing Ky. Rev. Stat. Ann. § 504.100(3)). The decision applying that statute did not involve any due process issue of the sort petitioner raises here; the Kentucky Supreme Court referred only to defendants' due process right not to be convicted while incompetent, not to any due process right to appellate review.

Petitioner's two other principal cases do adopt a rule permitting competency challenges to be raised on direct appeal from a guilty-plea conviction. These decisions do not make clear, however, whether they rest on the federal Constitution or simply on state law or the courts' own supervisory power. Significantly, neither of them discusses *Blackledge* or *Menna*, the federal cases on which petitioner chiefly relies (Pet. 19-22) and which the court of appeals distinguished in this case. The mere fact that other States have adopted, on policy grounds, a rule different from the District of Columbia's is not a basis for review, on constitutional grounds, of the court of appeals' decision in this case.

In *State* v. *Cleary*, 824 A.2d 509 (Vt. 2003), the court stated that it "will treat appeals of competency determinations as an exception to the waiver rule" generally followed in Vermont." *Id.* at 512. The court cited, without extensive discussion, the holdings of other state courts adopting a similar rule. *Ibid.* The court also cited this Court's decision in *Pate* v. *Robinson*, 383 U.S.

375 (1966), but noted that it arose "[i]n a different context." *Cleary*, 824 A.2d at 512. Although the court agreed as a logical matter with *Pate*'s statement that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have [a] court determine his capacity to stand trial," *ibid.* (quoting *Pate*, 383 U.S. at 384), the court did not purport to be applying a rule of federal constitutional law laid down in *Pate*.

Cleary cited the other decision on which petitioner principally relies, *People* v. *Armlin*, 332 N.E.2d 870 (N.Y. 1975). The court in *Armlin* devoted only three sentences of analysis to the waiver question and did not make the basis of its decision clear. The court cited *Pate* in the same way that the Vermont court did in *Cleary*, *i.e.*, for the proposition "that there is an inherent contradiction in arguing that a defendant may be incompetent, and yet knowingly or intelligently waive his right to have a court determine his capacity to stand trial in accordance with the Criminal Procedure Law." *Id.* at 874. The court also observed that it had previously "taken cognizance of the principles enunciated in *Pate*" to hold that the question of competency could not be forfeited by failure to raise it. *Ibid.* The New York Court of Appeals thus left vague whether it relied on federal law, on state law, or on its own powers, and this issue has not been clarified by the two subsequent New York decisions that petitioner cites. See *People* v. *Seaberg*, 541 N.E.2d 1022, 1025-1026 (N.Y. 1989) (enforcing an appeal waiver and holding that such waivers generally are valid, except when a "societal interest" in "fairness in the process" justifies making an exception, as in *Armlin*); *People* v. *Frazier*, 495 N.Y.S.2d 478, 479 (App. Div. 1995) (applying *Armlin*'s holding without analysis).

Thus, the decision below does not present a clear conflict with any decision of a state high court on the question presented, *i.e.*, whether due process entitles defendants in petitioner's situation to an appeal. States are free to adopt remedies for constitutional violations that exceed the required remedies under federal law. See *Danforth* v. *Minnesota*, 128 S. Ct. 1029 (2008). None of the decisions of a state court of last resort cited by petitioner announces a rule that the court claims is *compelled* by federal law.[4] Petitioner therefore has not presented an issue that warrants this Court's review.

3. Even if the court of appeals' reasoning created a conflict with other courts' decisions, resolution of any such conflict would have no substantive impact on this case. Petitioner contends that the court of appeals should not have dismissed his direct appeal. But for several reasons, any direct appeal, contrary to petitioner's contention (Pet. 24-25), would not have been substantively different from the appellate review peti-

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[4] Petitioner also cites (Pet. 14-16) a few decisions from trial and intermediate appellate courts, which generally are not a basis for review in this Court, because any conflict they create may be resolved by the State's high court. In any event, several of these decisions either do not expressly rely on the federal Constitution, see *State* v. *Wead*, 609 N.W. 2d 64, 68 (Neb. Ct. App. 2000), or arise in the habeas corpus context and thus are highly unlikely to involve any due process right to appellate review, see *King* v. *Cunningham*, 442 F. Supp. 2d 171, 185 (S.D.N.Y. 2006). Petitioner also cites (Pet. 15) *People* v. *White*, 308 N.W.2d 128 (Mich. 1981), but the language he quotes is from an opinion concurring in part and dissenting in part, *id.* at 139 (Moody. J.), and the cited analysis does not mention claims of incompetence; instead, it focuses on claims of entrapment. *Id.* at 140. Petitioner cites no decision of Michigan's highest court adopting his proposed rule. See Pet. 14-15, 18 n.4 (citing only *People* v. *Parney*, 253 N.W.2d 698 (Mich. Ct. App. 1977)).

tioner received, *i.e.*, review of his attempt to withdraw his guilty plea.

First, even on direct appeal petitioner's competency determination would be reviewed only for abuse of discretion. Pet. App. 26a (citing *Higgenbottom* v. *United States*, 923 A.2d 891, 897 (D.C. 2007)). That is the same standard by which the court of appeals reviewed the denial of petitioner's motion to withdraw his guilty plea. *Id.* at 8a (citing *Carmichael* v. *United States*, 479 A.2d 325, 327 (D.C. 1984)). Petitioner urges (Pet. 24-25) that the latter type of review is more difficult for defendants, but as the court of appeals explained, in this case *either* form of abuse-of-discretion review would necessarily turn on whether the trial court's competency determination rested on a view of the evidence that was clearly erroneous. See Pet. App. 8a-9a & n.10 (citing *Cooter & Gell* v. *Hartmarx Corp.*, 496 U.S. 384, 405 (1990)). Petitioner acknowledged as much in his appellate brief. See Pet. C.A. Br. 20, 22 (urging a clear-error standard of review in the direct appeal). And this Court has made clear that it "do[es] not question the State's power, in post-conviction proceedings, * * * to delimit the scope of state appellate review." *Drope* v. *Missouri*, 420 U.S. 162, 174 (1975).

Second, the court of appeals found no such clear error in the trial court's competency finding, which involved a credibility determination among competing expert opinions. That conclusion is fatal to petitioner's appeal—whether it is styled an appeal from his conviction or from the denial of his motion to withdraw his plea. Petitioner disputes the accuracy of the trial court's finding, but that fact-bound issue is not appropriate for this Court's review on certiorari. See, *e.g.*, Sup. Ct. R. 10; *United States* v. *Doe*, 465 U.S. 605, 614 (1984) (this

Court is "reluctant to disturb findings of fact in which two courts below have concurred"). And even if it were, petitioner could hardly show clear error. See *Anderson* v. *Bessemer City*, 470 U.S. 564, 574 (1985) ("Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous.").

Thus, even if petitioner persuaded this Court that his direct appeal should not have been dismissed, the decision below makes clear that the ultimate result would be the same: the competency finding would stand and the conviction would be affirmed.

4. Not only is petitioner mistaken in his contention that the supposed due-process right to a direct appeal would affect the outcome of his case, he overstates the significance of the issue more generally. In the District of Columbia courts, as in federal criminal proceedings and in many state courts, a defendant can enter a conditional guilty plea that reserves the right to appeal a legal issue, with the consent of the court and the government. See D.C. Super. Ct. R. Crim. P. 11(a)(2); accord, *e.g.*, Fed. R. Crim. P. 11(a)(2); *State* v. *Hodge*, 882 P.2d 1, 6-7 (N.M. 1994) (collecting state-level analogues). Thus, a defendant can plead guilty but preserve the ability to appeal an adverse pre-plea competency finding, by seeking the government's accession to a conditional guilty plea. See, *e.g.*, *United States* v. *Wayt*, 24 Fed. Appx. 880, 882-883 (10th Cir. 2001), cert. denied, 534 U.S. 1152 (2002); *In re J.M.*, 769 A.2d 656, 657-658 (Vt. 2001); *Gabbard* v. *Commonwealth*, 887 S.W.2d 547, 550 (Ky. 1994); cf. *Doggett* v. *United States*, 505 U.S. 647, 658 n.3 (1992) (rejecting the government's argument that Doggett's guilty plea waived his right to appeal an adverse pretrial speedy-trial ruling because Doggett

entered a conditional plea reserving his right to appeal that issue, not "a guilty plea simpliciter"). Indeed, in considering whether to retain the rule that an unconditional guilty plea waives the right to appeal a competency determination, state courts have noted the availability of conditional guilty pleas as a ready alternative avenue of obtaining review. See *State* v. *Al-Kotrani*, 106 P.3d 392, 395 (Idaho 2005).

This widely available alternative undermines petitioner's assertion (Pet. 25) that the question presented has broad significance. Defense counsel simply do not face a "dilemma" in every case involving competency (*ibid.*) where a conditional guilty plea offers them a third alternative, one that may "relieve the problem of congested criminal trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz* v. *Newsome*, 420 U.S. 283, 293 (1975).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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